



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

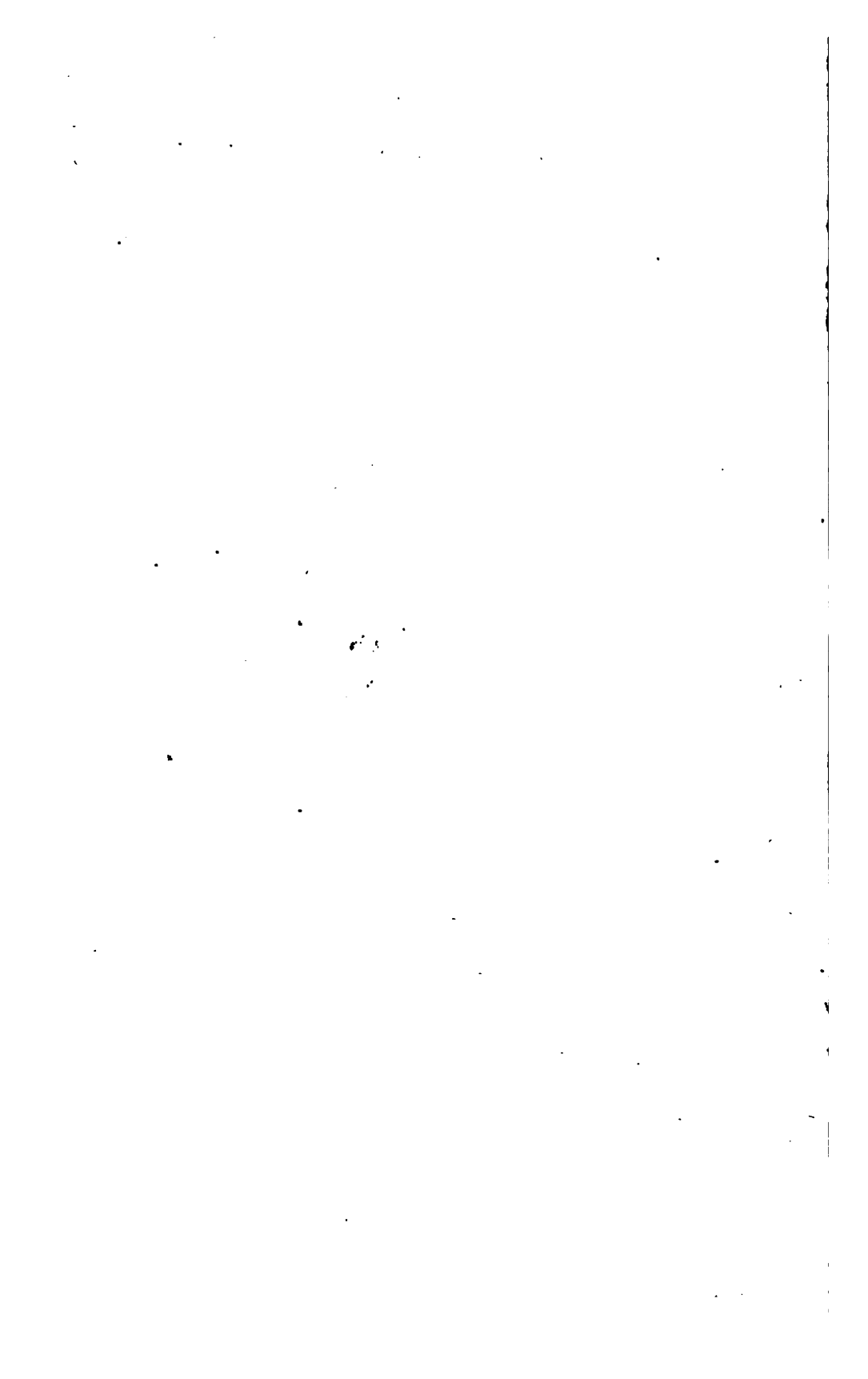
About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY

VOL. 2 PORTER-ALABAMA REPORTS.

2 9	2 145	2 236	2 342	2 456	2 542
4sp 365	8p 153	2p 539	5 83	6p 427	7p 32
4p 409	9 501	6p 412	9 785	2 738	9p 124
38 139	30 708	15 790		3 634	52 218
60 533	40 645	39 500	2 351	4 395	
	58 606	52 136	9p 453	4 401	2 546
	59 601		1 236	5 289	1 40
2 17		2 239	2 405	6 663	14 29
3 134		8p 251	4 691	6 672	
3 743	2 148	30 388	8 577	14 717	
42 632	7p 61	81 241	24 636	15 391	2 550
	1 340		26 339	51 112	4p 367
2 24	13 30	2 249	79 415		9p 904
7p 173	32 308	5p 151		2 463	3 675
	36 48	21 406	2 376	7 562	6 37
	43 284	47 509	4 619	8 351	6 872
2 29	2 157		22 526	14 807	9 723
1 424	42 176	2 262		15 670	15 269
7 99		6p 28	2 386	39 519	19 451
13 38		2 212	9p 525	44 272	51 403
42 292	2 162				64 261
79 18	8p 55	13 143	39 212		
	1 591	48 539		2 480	
2 33	3 728			3p 374	
15 719	42 184	2 276	2 389	4 157	
19 244	44 486	3 395	9p 59	5 724	
50 586	48 238	25 444	9p 236	6 72	
64 450	54 430		6 648	12 170	
66 269		2 280	14 473	50 520	
	2 171	15 27	2 401	58 112	
2 38	4p 106	53 631	4 59		
10 583	19 26	54 352	6 662	2 493	
21 70	16 366	60 461	7 958	3p 156	
24 394	16 466	65 273	10 536	3p 290	
30 250	24 187		14 66	3 627	
	52 141	2 286	15 27	5 321	
2 44	58 32	4 120	15 393	8 475	
3p 248	80 177	6 911	38 715	10 78	
5p 522		21 260		34 23	
2 563	2 177	29 473	2 414	40 228	
12 814	37 577	34 98	35 136	41 123	
15 549	54 597	40 151	59 538	57 421	
22 456				61 397	
30 65	2 182	2 296	2 433	78 324	
	23 777	3p 416	12 549		
2 48		10 49	50 389	2 519	
1 267	2 185	39 267		7p 129	
15 676	6 750	39 309	2 436	1 76	
22 699			3p 371	3 112	
36 683	2 186	2 308	3p 383	25 565	
	22 186	2 284	5p 87	30 669	
2 54	37 587	8 251	5p 250	30 677	
21 88		13 438	5p 342	51 389	
66 525	2 196	16 772	8p 27		
	5 445	21 790	12 170	2 529	
2 58			13 259	66 568	
5 101	2 205	2 315	30 530		
70 288	1 328	5p 105	35 123	2 530	
	3 147	21 294	56 533	32 220	
2 86	3 199	28 622	66 193	53 406	
11 687	4 504	31 607	72 457	53 407	
38 574	13 503	83 431	87 204		
	15 110		88 438	2 538	
2 89	21 650	2 328		6p 403	
32 47	30 495	9p 667	2 451	6 38	
	32 260	1 597	7p 130	15 750	
2 100		9 620	3 385	52 136	
2p 136	2 213	15 99	30 699		
5p 491	36 719	19 450		2 540	
		36 640		8 374	
		39 720			
		40 533			
		64 351			



REPORTS

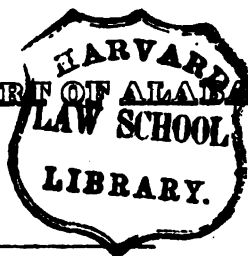
OF

CASES AT LAW AND IN EQUITY

ARGUED AND ADJUDGED

IN

THE SUPREME COURT OF ALABAMA.



BY

BENJAMIN F. PORTER.

VOL. II,

Containing the Decisions of part of January, and of June Terms, 1835.

TUSKALOOSA :

PRINTED BY MARMADUKE J. SLADE.

1836.

Qm2

Copy-right secured, according to law.

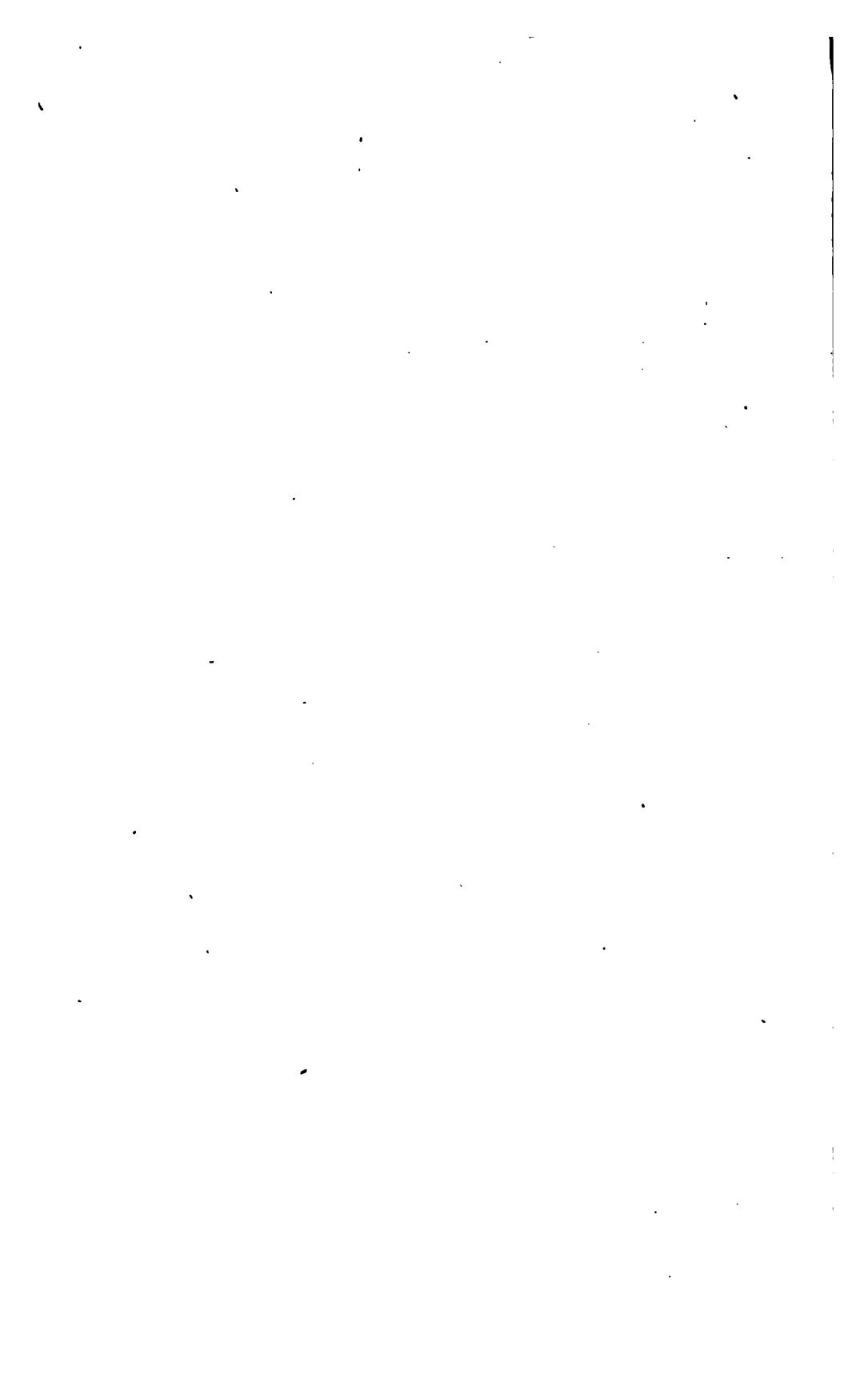
TO THE BENCH AND BAR.

The Reporter in issuing the Second Volume of these Reports, feels justified in tendering an apology to the Bench and Bar, for the imperfect situation of the first volume, published a year ago. That Book contains many errors, chiefly in regard to its typography, which, in consequence of absence, and domestic afflictions at the time of its publication; the Reporter could personally neither obviate or remedy. It is with pleasure announced, that a second edition is in a state of preparation, and will soon be published, improved in every particular.

It is believed that this Volume, however, is as free from imperfection, and as correctly executed, as Law books usually are; and it is hoped, will authorise the promise of still further improvement, in the forth coming volumes.

But the Reporter is not satisfied, but that he owes to the members of the Bar some excuse for the appearance of the argumen's. The duties of the Reporter are of an exceedingly arduous nature; and certainly do not permit that attention to the arguments of counsel, which is due to the character of the Bar. While the publication of the entire arguments in a cause, would be incompatible with the design of a book of Reports; it cannot be expected that an arbitrary selection, from a few unconnected notes, taken in the hurry of debate; would either satisfy the profession or do justice to the Reporter. It is therefore respectfully urged upon the members of the Bar, in all cases of sufficient importance, to furnish their positions in arguments, stated as concisely as possible; and thus relieve the Reporter from the labor and responsibility of preparing, what the Bar, may not always feel disposed to acknowledge as legitimate.

TUSCALOOSA, JUNE 1836.



OFFICERS OF THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

Hon. REUBEN SAFFOLD, *Chief Justice.*

Hon. HARRY I. THORNTON, *Associate Justice.*

Hon. HENRY HITCHCOCK, *Associate Justice.*

PETER MARTIN, Esquire, *Attorney General.*

HENRY MINOR, Esquire, *Clerk.*

A TABLE

Of the Cases Reported in this Volume.

NOTE.—The letter *v.* follows the name of the plaintiff in error; *and*, that of the defendant.

A.		Cunningham's ex'rs <i>and</i> Neil, use, &c.	171
Adams <i>and</i> Thomas,	Page 185	Cunningham, et al. <i>and</i> Burford,	244
Adkins, et ux. <i>and</i> Burke,	236	D.	
Aldridge <i>v.</i> Warner's ex'rs,	92	Daniel, et al. <i>and</i> Mead,	86
Atkinson <i>and</i> Oliver,	546	Deas <i>and</i> Cawthorn,	276
Avent <i>v.</i> Read,	480	Dobbs, et al. <i>v.</i> Cockerham's distrib's	328
Ayres <i>and</i> Tarrant <i>and</i> Wyatt,	157	Dorrah <i>and</i> Hogg,	212
B.		Dyer <i>v.</i> Tuskaloosa Bridge Comp'y	296
Baird <i>v.</i> Nichols,	186	E.	
Ballew, adm'r <i>and</i> Johnson,	29	Eastin <i>and</i> Gayle <i>and</i> Malone <i>and</i> }	182
Bank, The <i>v.</i> Hooks <i>and</i> Davis,	271	Lake,	
Bank, The <i>v.</i> Harrison,	540	Eastin <i>and</i> May <i>and</i> May, ex'rs,	414
Barr <i>v.</i> White,	342	Estill <i>v.</i> Shelley,	185
Bates, adm'r <i>and</i> Chamberlain, adm'r	550	Evans <i>v.</i> Watrous,	205
Baylor <i>v.</i> Scott,	315	F.	
Bell, et al. <i>and</i> Huntington,	51	Faulk <i>v.</i> Judge Co. Court of Monroe	538
Boardman <i>v.</i> Poland,	431	Fitts <i>and</i> Sawyer,	9
Boyington <i>v.</i> The State,	100	Franklin, et al. <i>and</i> Sewall,	493
Bullock <i>v.</i> Wilson,	436	G.	
Bullock <i>v.</i> The Governor,	484	Garvin <i>and</i> Merriwether,	199
Burford <i>v.</i> Cunningham, et al.	244	Gilles, et ux. <i>and</i> Caldwell,	526
Burke <i>v.</i> Adkins, et ux.	236	Gilbert <i>and</i> Tate, guardian,	386
C.		Glover <i>and</i> Pledger,	174
Callison <i>v.</i> Little,	89	Governor, The <i>and</i> Bullock,	484
Callison, et al. <i>v.</i> Lemons,	145	H.	
Caldwell <i>v.</i> Gillis, et ux.	526	Hagen <i>v.</i> Thompson,	48
Campbell <i>and</i> Woodcock,	456	Harkins, et al. <i>v.</i> Coalter, et al.	463
Carter, et al. <i>v.</i> Crews,	81	Hardy <i>and</i> Ivey,	548
Cawthorn <i>v.</i> Deas,	276	Harrison <i>and</i> The Bank,	540
Chamberlain, adm'r <i>v.</i> Bates, adm'r,	550	Harrison <i>v.</i> Weaver,	542
Christian <i>and</i> Goynne <i>and</i> Johnson }	201	Hatch <i>v.</i> Crawford, adm'x.	54
and Wash,		Hatfield <i>v.</i> Montgomery, et al.	58
Coalter, et al. <i>and</i> Harkins, et al.	463	Haughy <i>v.</i> Strang,	177
Cockerham's distr's <i>and</i> Dobbs, et al.	328	Hayter <i>and</i> McElyea,	148
Collins <i>and</i> Tindall,	17	Haynes <i>v.</i> Sledge <i>and</i> Maxy,	530
Commons <i>and</i> Waters,	38	Hearne, et al. <i>and</i> Thomas <i>&</i> Harris	262
Cook <i>&</i> Ellis <i>and</i> Randolph,	286	Henry <i>v.</i> Turner,	23
Coker <i>and</i> Moore <i>and</i> Baker,	347	Hickenburg <i>and</i> Pierce <i>&</i> Baldwin,	196
Cox, et al. <i>v.</i> Cox,	533	Hightower <i>v.</i> Ivey,	308
Crews <i>and</i> Carter, et al.	81	Hogg <i>v.</i> Dorrah,	212
Crawford, adm'x. <i>and</i> Hatch,	54	Holloway's guardians <i>and</i> Switzer,	88
Crockett <i>and</i> Trotter	401	Hooks <i>and</i> Davis <i>and</i> The Bank,	271
		Hopkins <i>v.</i> Thompson,	433

Horton v. Ronalds,	79	Pledger v. Glover,	174
Hutchison, ex'r. v. Tolls,	44	Poland and Boardman,	431
Huntington v. Bell, et al.	51	R.	
I.		Randolph v. Cook & Ellis,	286
Ivey and Hightower,	308	Randolph v. Perry,	376
Ivey v. Hardy,	548	Read and Avent,	480
Johnson v. Ballew, adm'r,	29	Richardson v. Williams,	239
Johnson and Wash v. Christian and	} 201	Rogers & Sons v. Smiley & Griffin,	249
Goynes,		Ronalds and Horton,	79
Judge Co. Court of Monroe and Faulk	538	S.	
K.		Sawyer v. Fitts,	9
Kennon v. McRea,	389	Scott and Baylor,	315
Koger v. Weakly, et al.	516	Sewall v. Franklin, et al.	493
L.		Shelley and Estill,	185
Lemons and Callison, et al.	145	Skinner v. McCarty,	19
Lewis and Munn and Griffin.	24	Sledge and Marx and Haynes	530
Little and Callison,	89	Smiley & Griffin and Rogers & Sons	249
Lowrey v. Murrell,	280	Smith & Co. and Turk,	155
M.		Southwick, et al. and Marr's ex'ix,	351
Malone and Lake v. Eastin and Gayle	182	Starnes & Co. v. Pierce,	227
Marr's ex'x v. Southwick, et al.	351	State, The and Boyington,	100
May and May, ex'rs v. Eastin,	414	Standifer and McWhorter,	519
Mayor and Aldermen of Tuscaloosa	} 230	Strang and Haughy,	177
v. Wright		Switzer v. Holloway's guardians,	88
McCarty and Skinner,	19	T.	
McEldery and Chapman, ex'rs v. }		Tate, guardian, v. Gilbert,	386
McKenzie,	33	Thomas & Harris v. Hearne, et al.	262
McElyea v. Hayter,	148	Thomas v. Adams,	188
McKenzie and McEldery and Chap-	} 35	Thompson and Hopkins,	433
man, ex'rs,		Thompson and Hagen,	48
McRea and Kennon,	389	Tindall v. Collins,	17
McWhorter v. Standifer,	519	Tolls and Hutchison,	44
Mead v. Daniel, et al.	86	Trotter v. Crockett,	401
Merriwether v. Garvin,	199	Turk v. Smith & Co.	155
Moore v. Patton, Donegan & Co.	451	Turner and Henry,	23
Moore & Baker v. Coker,	347	Tuscaloosa Bridge Comp. and Dyer,	296
Montgomery, et al. and Hatfield,	58	W.	
Munn and Griffin v. Lewis,	24	Walters v. Commons,	38
Murrell and Lowrey,	280	Warner's ex'rs and Aldridge.	92
N.		Watrous and Evans,	205
Nabors v. Nabors,	162	Weakly, et al. and Koger,	516
Neil, use, &c. v. Cunningham's ex'rs	171	Weaver and Harrison,	542
Nichols and Baird,	196	White and Barr,	342
O.		Wilson and Bullock,	436
Oliver v. Atkinson,	546	Williams and Richardson,	239
P.		Woodcock v. Campbell,	456
Patton, Donegan & Co. and Moore	451	Wright and Mayor & Al. Tuscaloosa	230
Perry and Randolph,	376	Wyatt v. Ayres & Tarrant,	157
Pierce & Baldwin, &c. v. Hickenburg	196		
Pierce and Starnes & Co.	227		



REPORTS

OF

THE DECISIONS

OF

THE SUPREME COURT OF ALABAMA,

JANUARY TERM, 1835.

SAWYER *versus* FITTS.

Whether it is or not discretionary with a Court to compel a party to join in a demurrer to evidence—*Quære*. But, on demurrer to evidence, the party must admit the facts and conclusions which may be reasonably inferred therefrom, otherwise the adverse party is not bound to join in the demurrer.

In an action of trespass, to try title, a verdict for plaintiff that he recover the land "and one moiety of the mills" sufficiently certain.

THIS case was brought into this Court by a writ of error from the Circuit Court of Bibb. It was an action of trespass to try title, and a verdict and judgment were had in favor of the plaintiff below. The defendant in the lower Court filed a demurrer to the evidence, (which was mostly circumstantial,) but refused to admit the facts and circumstances of that evidence. The Court below refused to compel a joinder in demurrer, and such refusal was assigned as cause for reversal in this Court.

FREEMAN, for Plaintiff in error.

In this case the plaintiff refused to join in demurrer to the evidence; and the Court refused to compel the joinder. The bill of exceptions shows that the demurrer embraced all the written testimony in the cause, on which the plaintiff could rely for title. This was trespass to try title. The plaintiff must rely on the strength of his own title for success; and when his whole title is spread before the Court, is he not bound to join in demurrer? The Judge says, the evidence was, in a great measure, circumstantial, and the defendant refused to admit the facts that might be inferred from the circumstances. This circumstantial evidence could not, as the bill of exceptions shows, have referred to the title, but must have had reference to the amount of value, and the like. But what fact could have been inferred from a circumstance? It is from facts that inferences or conclusions may be drawn.

STEWART, *contra*.—Whether a party shall be required to join in demurrer to evidence, or not, is within the discretion of the Court. It is true, the Court *may* compel the party to join in demurrer. From the very nature of the proceeding, it must be within the discretion of the Court. The revising tribunal cannot judge of the circumstantiality of the evidence, and whether the party could be compelled to join in demurrer to evidence without injury, as the Court below can.

FREEMAN, in reply.—This doctrine, that the compelling of a party to join in demurrer is exclusively within the discretion of the Court, I have found in no law book, except in an opinion of one of the Judges of our Supreme Court, under its former organization.

I contend that as to joinder in demurrer, the party requiring such joinder has rights, and that the Court may err in disregarding them. It appears by the record, that the defendant below moved to have the whole evidence taken down and put in the demurrer; which motion was not granted.

By Mr. Justice SAFFOLD :

Fitts brought an action of Trespass, to try titles, against the plaintiff in error. The subjects of controversy were, the south half of a certain half quarter section of land, described in the declaration, containing a water grist and saw mill; all of which, the plaintiff below, alleged to be his property. Plea, general issue.

On trial, Fitts recovered, by verdict and the judgment of the Court, the land in question, "and one moiety of the mills sued for," and also, damages for the detention.

It appears, from a bill of exceptions then taken, and in the language thereof, "that the defendant moved the Court to appoint some person to take down the evidence, as the defendant intended to demur to the same; which appointment the Court declined to make. After the plaintiff's evidence was gone through, the defendant's counsel drew up a demurrer to the evidence, and presented it to the plaintiff's counsel for a joinder, but which was refused. The Court then called on the defendant to introduce his testimony to the jury,—which he declined. The Court then directed the plaintiff's counsel to proceed to the jury. The Court refused to compel the plaintiff to join in demurrer, because the evidence was, in a great measure, circumstantial, and because the defendant refused to admit the facts which might be reasonably inferred from

the circumstances. The demurrer set forth a true copy of the deed, under which the plaintiff claimed title, and the contents of another instrument of writing relative to the mills, which recited, that the plaintiff and defendant were jointly interested in the mills, but which instrument had been destroyed by the defendant. This was all the written testimony, and there was no other evidence of title, nor any proof of trespass on the land, except an ouster from the mills."

To this decision of the Court, the defendant excepted.

The assignments of error, are,

1. The refusal of the Court to compel the plaintiff to join in demurrer to the evidence.
2. The verdict and judgment are vague and insufficient.

1. Whether, in a case, proper for a demurrer to evidence, the Court has a discretion, to require the adverse party to join in it, or not, is a question on which the authorities are not the most satisfactory or decisive. The usual practice, however, in various Courts of the highest authority, has been, to allow the demurrer; and it has often been considered a matter of right, not of discretion, in the Court, if the party claiming it comply with the requisites on his part: but it is clear that neither party is entitled to the benefit of such demurrer, nor can the Court allow it, unless the party demurring will admit the truth of all the *facts*, and every *conclusion* which the proposed evidence conduces to prove, and this to be entered of record—*Gibson & Johnson vs. Hunter*.^a

^a 2 H. Bl. 187.
1 Ph. Ev. 235,
236—1Saund.
Pl. & Ev. 571.

It appears from the authorities, that the *relevancy* of the evidence to the issue, is the only matter for the determination of the Court, whether it be demurred to or submitted to the jury, and that all testimony is *relevant*, which in any degree conduces to prove the material facts.

Judge Gould^a has considered this subject very fully. He maintains, that as the relevancy of the evidence is ^{a Gould's Tr. on Pl. 430, '1.} the only point of which the Court can judge, on demurrer, it can never be safe for a party to demur to evidence which is clearly relevant to the *whole* issue: But says, "Where the whole evidence exhibited in support of the affirmative of the issue, is relevant to a *part* only of the issue, it may be safely demurred to; because, in such case, the evidence could not warrant a finding of the issue, by the jury, in favor of the party exhibiting the evidence." He admits, that it is a question not fully settled, in the older books, how far *unwritten* evidence is liable to be demurred to; but, insists that where all the evidence in support of the affirmative of the issue, is *written*, as in case of a *bond*, as evidence of a debt, or of a *deed of conveyance*, or *record*, as evidence of title to land, under the general issue, all the authorities, ancient and modern, agree, that the defendant may demur to the evidence;^b and that, according to the modern doctrine, evidence ^{b Gould's Pl. 183.} of *any kind*, may be demurred to, under the restrictions or conditions prescribed by the rules of practice.^c On the point most applicable to this case, he says: ^{c Gould's Pl. 184.} "Where the evidence is *circumstantial*, the party demurring, must distinctly admit, *upon the record, every fact, and every conclusion*, which the evidence conduces to prove—in other words, every fact which the jury might have inferred from it; otherwise, the adverse party is not bound to join in the demurrer: because, without such admissions, the *weight*, as well as the *relevancy* of the evidence, would be referred to the Court, on which the Court can pronounce no judgment."^d He adds, "If a party offering to demur to evidence, is wrongfully overruled by the Court, his ^{d Gould's Pl. 437.} remedy is, by *bill of exceptions*, and a *writ of error*."

^a Gould's Pl.
491.—(Vide 9
Co. 13 b.—B.
Ab. Bills of E.
ib. Pleas, &c.
v7 Cranch. 535

founded upon it.”^a But, in *Young vs. Black*,^b the Supreme Court of the United States held it to be a matter of discretion with the Court of original jurisdiction, whether to compel a party to join in demurrer to evidence; and that it ought not to be allowed where the party demurring refuses to admit all the facts which the evidence legally may conduce to prove. That Court declined to express any opinion, whether a *refusal* to compel a joinder, could, in any case, be *assigned for error*: though it was declared to be a subject within the discretion of the Court, to which the application was made, the understanding was expressed, that the consequence did not necessarily result, that a writ of error would not lie for an improper exercise of it. On this point Chief Justice *Marshall* remarked, that their former decisions on the subject of discretion, &c. were to be considered as law, but they were not to be extended farther. Yet three of the Judges, *Livingston*, *Johnson*, and *Story* expressed their opinions that the writ of error would not lie in such case. Their reasons are very satisfactory to my own mind, and are in substance these—that the court trying the cause will generally be in a situation to decide more correctly, having all the circumstances of the case before it, than an appellate tribunal; and that if it should commit a mistake in the exercise of its mere discretion, in refusing to compel a party to join in demurrer to evidence, or in refusing to grant a new trial, or to continue a cause, less mischief will arise from requiring the parties occasionally to submit to such inconvenience, than to open a door to the endless litigation which would arise from appeals, in all the variety of cases, of this nature which must necessarily occur in the progress of every contested action. They also maintained that these causes were never assigned for error in *Great Britain*.

It may also be observed, that but little injury need be apprehended from allowing this discretion to the Court: proper cases for its exercise but rarely occur, in which the party deems it necessary to his safety. The nature of the application implies distrust in the jury, which is an institution highly congenial to the character of our government, and a great favorite in the American constitutions: hence the guarantee, that "the right of trial by jury shall remain inviolate." It is to be presumed, in general, that the party can have the same benefit of the superior judgment of the Court, by instructions to the jury, as by its decision on demurrer to the evidence; or, by the grant of a new trial, if the jury be prejudiced. The legal presumption also, is, that the Judge, having the discretion, will compel a joinder in the demurrer, when of right it ought to be done.

In the case of *Brandon vs. The Huntsville Bank*,^a decided by this Court, the question did not occur, • 1 Stew. 320. whether it would be error, in a proper case, to refuse to compel a joinder in demurrer to evidence. The question was, whether such compulsion would constitute error. We held, that it would not; and that the party had a right, that being a proper case, to demur to the evidence. Such is the principle of the authorities I have cited, though it be considered, as in the case of *Young vs. Black*, a subject within the judicial discretion of the Court.

In as much, however, as this case was not argued before a full bench, and can be otherwise disposed of, the Court declines to pronounce any decision on the question, whether, in a proper case for a demurrer to evidence, the refusal of the Court to compel the adverse party to join in it would be a matter, of which, advantage can be had, in error. But, whether the demurrer be considered a matter of right to the party,

or of discretion in the Court, it does not appear in this case, that the plaintiff in error entitled himself to it by the requisite admissions; but the contrary is stated in the bill of exceptions.

It is true, he proposed that all the evidence should be taken down, and after it was introduced, tendered to the adverse counsel, a demurrer. It is not however, shown, what the demurrer contained; and if we could infer that it contained all the evidence offered by the plaintiff, both written and parol, (and in respect to the latter, at least, the bill of exceptions is indefinite,) it is not pretended that it contained the *conclusions* which this evidence conduced to prove. The contrary is expressly stated in the exceptions—that the party claiming the demurrer, “refused to admit (even) the facts which might be reasonably inferred from the circumstances” in evidence. We must therefore say, there was no error in refusing to compel a joinder in the demurrer.

2. The objection presented by the second assignment, is explained to be, that the verdict and judgment award to the plaintiff below, “one moiety of the grist and saw mills;” without defining whether it be a divided or undivided moiety. We think the subject matter sufficiently explanatory on this point; that it is unsusceptible of division, the language of the recovery embracing, equally, both the grist and saw mills; and that an undivided moiety, consisting of half the interest of both, was recovered; consequently, the verdict and judgment are sufficiently certain. Judgment affirmed.

TINDALL *versus* COLLINS, Survivor.

A discontinuance against a party not served with process, who is a *joint contractor*, (in a contract not embraced by the act of 1818) is error.

The act of 1818, authorising a discontinuance where the writ is returned, "not found," as to one or more of the defendants, does *not* embrace the case of a *co defendant to a joint contract in writing*, (not under seal,) *for the performance of work and labor*.

The statute of *Jeofails* does not cure the error of such a discontinuance—especially if the issue below was not on the *merits*.

THIS was an action, brought by the defendant in error, in the Circuit Court of Mobile, to recover on a joint contract, executed between Collins and his deceased partner Bebe, and Tindall and one Myers. The said Tindall and Myers had jointly contracted with Collins and Bebe for the performance of a job of work; and the action was to recover for a breach of the agreement, which was not a *covenant*. The writ was issued against both Tindall and Myers, but the same was executed on Tindall only. On the trial, the plaintiff below, filed a declaration, discontinuing as to Myers, and complaining against Tindall as sole defendant; on which there was a judgment for the plaintiff. To reverse this judgment a writ of error was taken to this Court.

STEWART, for Plaintiff.—SALLE, *contra*.

By Mr. Justice THORNTON.

This case is brought up by writ of error, from the Circuit Court of Mobile County, to reverse a judgment rendered therein against the plaintiff in error. There are many errors assigned; to any of which, except one, it is unnecessary to advert, as that is decisive of the whole case. The assignment referred

to, is, of a discontinuance of the cause of action by the plaintiff. The suit is brought against the defendant Tindall, and one William Myers, to recover damages for the breach of a written contract, said to have been entered into between the defendant in error, and his deceased partner, Elisha Bebe, of the one part, and the plaintiff in error, and the said Myers of the other; which writing was a contract, for work and labor to be done by the latter, in consideration of a sum of money to be paid in the manner, and at the times specified in the contract, by the former. This instrument is averred to be under the hands of the parties only, and is not a covenant. The writ issued against both the said plaintiff in error and Myers; and the declaration discontinues the action against Myers, on whom, it is averred, the writ was not served, and complains of the plaintiff in error, as sole defendant. By the common law, a discontinuance as to a party who was, as here, a proper co-defendant to the action, operated as a discontinuance of the whole cause. The statute of 1818, which authorises a discontinuance where the writ is returned "not found," as to one or more of the defendants, embraces only actions upon bonds, covenants, bills, promissory notes, and judgments, neither of which is the contract declared on in this suit.—(See *Thompson vs. Saffold*, 22 S.W. 494. *et als.*) The same result would follow, if the defendants in the writ were partners in the matter of the contract, instead of joint contractors. In that event, there could be no dismissal as to one; for, by the statute above referred to, service on one would be service on both; and the declaration should follow the writ as to the parties. The statute of *Jeofails*, which is relied upon to cure this defect, has been, at least, constructively decided by this Court, not to do so, even where a material issue had been tried: (See

the case of *Addins and al. vs. Allen*,^{*)} But, without^{*1 Stew. 130,} that authority, we consider that the error was not cured in this case, by the trial of the issue had in the Court below, which was on a plea in abatement to the jurisdiction, and did not involve the merits of the case.

Let the judgment be reversed.

SKINNER versus McCARTY.

Where A and B, being sued on a note before a Justice of the Peace, A appeared, and on oath denied the execution of the instrument, and judgment was rendered against B, who did not appear, but who carried the case by *certiorari*, into the County Court: *Held*, that filing declaration against B alone, did not create a discontinuance.

Sealing is an essential requisite to constitute a perfect bond, and an instrument purporting to be a *certiorari bond*, but containing no seals, is void.

In this case, the defendant in error sued Scarborough and Skinner, before a Justice of the Peace, in the county of Clarke, on a note of hand. Scarborough, under oath, denied the execution of the note—whereupon, the justice gave judgment, by default, against Skinner, who did not appear. Skinner subsequently took the case, by *certiorari*, into the County Court of Clarke; where, after several continuances, verdict was rendered against him. Skinner took a writ of error to this Court, and among other assignments for reversal, alleged—

1. That the original suit having been against two, and the declaration being against Skinner alone, a discontinuance was thereby created.

2. That the *certiorari* bond was void for want of the seals.

By Mr. Justice HITCHCOCK.

This was an action originally commenced before Isaac Pew, a Justice of the Peace for the county of Clarke, in favor of Charles McCarty, for the use of James S. Rowland, against one Silas Scarborough and Thomas A. Skinner, one of the plaintiffs in error, upon a note payable to McCarty, dated the 3d October, 1829, for nineteen dollars. At the trial before the magistrate, Scarborough appeared, and under oath, denied the execution of the instrument. Skinner did not appear, and the magistrate rendered judgment against him alone, by default, for the sum of nineteen dollars eighty-eight cents, on the 28th of August, 1830. On the 29th September, 1830, Skinner applied to Samuel Wilkinson, Judge of the County Court for the County of Clarke, for a *certiorari*, to bring the case before that Court, and "that all further proceedings should be stayed in the case;" upon which petition, the Judge endorsed an order in the following words: "Mr. Thomas Saunders—You will issue a writ of *certiorari*, according to the prayer of the petitioner.—"Signed, Samuel Wilkinson, J. C. C. C." Upon this order, the Clerk, Mr. Thomas Saunders, issued a *certiorari* to the magistrate, to bring up his proceedings to the County Court; and took from the plaintiff in error, an instrument having all the formal requisites of a *certiorari* bond, signed by the plaintiff, but which instrument is without any seals to the signatures of the parties.

At the December term, 1830, of the County Court, the *certiorari* was returned, with the proceedings of the magistrate, and the plaintiff filed a declaration against Skinner, but not against Scarborough; to which declaration, Skinner, by his attorney, pleaded "non-assumpsit." The case appears to have been

continued to February term, 1832, when a jury was called, who are named in the record, and "on motion of the defendant's attorney, the case was continued." At February term, 1833, the case was tried before a jury, and a verdict was had for the plaintiffs, and a new trial was granted, and the cause was continued. At the February term, 1834, the case was again submitted to a jury, and a verdict was had for the plaintiffs for twenty-five dollars and twenty cents; and a judgment was rendered by the Court against Thomas A. Skinner, the original defendant, together with James Magoffin and James McClure, "the securities in the writ of *certiorari* bond," for the amount of the verdict, with costs of suit.

To reverse this judgment, the case has been brought, by writ of error, into this Court, and has been submitted, without argument, upon the following assignments.

1. That the suit was originally brought against two, and when brought by *certiorari* into the County Court, the declaration was filed only against one, thereby creating a discontinuance.

2. That a jury was called at June term, 1831—that no juror was withdrawn, and no verdict rendered; thereby also creating a discontinuance.

3. That judgment was rendered against the securities in the *certiorari* bond, when there is no statute authorising that summary mode.

4. That the *certiorari* bond is void, there being no seals: and,

5. That the bond is void; no bond being required by the *fiat* of the Judge granting the *certiorari*.

In relation to the first assignment, it is sufficient to remark, that the defendant, Scarborough, having (under the provisions of the statute,* which authorises § 137. a defendant, under oath, to deny the execution of any

*Aik. Dig. 263
§ 137.

instrument sued on,) denied that he had executed this note, or authorised any one to execute it for him; and the other defendant, Skinner, having failed to appear, but let judgment go by default, the case, as to Scarborough, was properly at an end, and could only be taken up by Skinner, and consequently, the declaration could only be filed against him.

Independent of this consideration, the defendant, Skinner, by pleading non-assumpsit to the declaration, thereby waived any error there might otherwise have been in the proceedings.

In relation to the second assignment, it appears that after the jury was called and sworn, the defendant applied for and obtained a continuance. He, therefore, cannot allege the want of the withdrawal of a juror, or the want of a verdict, as error; and besides this, he had the case twice subsequently submitted to a jury, without alleging a discontinuance in the Court below.

As to the third assignment, it may be remarked, that if the bond was properly taken and executed, ^{*Aik. Dig. 165} the second section of the act of 1826,* gives to the bond the force and effect of a judgment against all the obligors, and authorises execution to be issued against them.

It is alleged in the fourth assignment, that the instrument is void as a bond, there being no seals. This objection is considered by the Court, to be properly taken. Sealing is a distinct and substantive requisite, to constitute a perfect bond, and without it, the instrument is not binding on the parties. For this cause, the judgment below must be reversed, and a proper judgment rendered here, against Skinner, the defendant in the original suit below.

As to the fifth assignment, whether the bond would have been void, if otherwise perfect, for the want of

the *fiat* of the Judge in granting the *certiorari*, no opinion is necessary ; and, as the case has not been argued, none is given.

HENRY *versus* TURNER.

One who crosses a river at a ferry in a boat not belonging to the owner of the ferry, and who lands by stepping from the ferryman's boat, is not liable in an action to recover the rate of ferriage, allowed by law ; however he would be responsible for the invasion of the plaintiff's franchise, or for trespass.

THIS action was brought in the County Court of Bibb, to recover the rate of ferriage allowed by law to the plaintiff, Henry. The defendant, Turner, had, it appeared, crossed the river in a canoe, not belonging to the owner of the ferry ; and had landed, by stepping into the boat of the plaintiff. The Court below, determined that the action was not sustainable : Whereupon, the defendant took his writ of error to this Court.

FREEMAN, for Plaintiff—cited *Aik. Dig.* 396.

STEWART, *contra*.

By Mr. Justice THORNTON :

This was an action brought by the plaintiff in error, who was also plaintiff below, to recover of the defendant an amount due for ferriage to the plaintiff, who appears to have been in possession of the ferry landing, and necessary water craft, at Centerville, on the Cahawba river. The proof is, that the defendant, by means of a canoe, which is proven not to have belonged to the plaintiff, nor to be one of the

water craft, kept and provided for the said ferry, crossed the river, and got out on the landing side into one of the plaintiff's boats. The Judge who tried the cause below, decided that the plaintiff could not recover, in this action, for the ferriage; and in this, which is the only error assigned, we think he did not err. The reason which the Court below gave for this decision, adverse to the plaintiff, is not a matter which can be assigned for error; and therefore, we cannot properly determine, whether that reason be a sound one or not. The result was correct; for the reason, that from the proof; however the defendant may be liable for invasion of the plaintiff's franchise, or for trespass done by getting into his ferry boat, he was not responsible for the rate of ferriage allowed by law, as if he had been ferried over the stream in the craft of the plaintiff.

Let the judgment be affirmed.

MUNN AND GRIFFIN *versus* LEWIS.

The "*County Court*," acting judicially, has no authority to take the acknowledgment of a deed of lands: and where the acknowledgment of a deed appeared to have been taken in *open Court*, and the entry thereof was transferred from the minutes to the back of the deed, by the clerk, it was held, that such acknowledgment was void.

The *Judge* or *Clerk* of the County Court have authority to take such acknowledgments; but they are independent ministerial acts, which the officer before whom made, must certify on the back of the deed.

LEWIS brought his action of trespass, to try title, against Munn and Griffin, in the Circuit Court of Madison. A portion of the testimony relied on by the plaintiff below, to perfect his title, was a deed of trust. The certificates on the back of the deed show-

ed, that at the August term, 1827, of the County Court of Madison, the said deed was produced in open Court, the execution thereof acknowledged, and the same ordered to be recorded, which order was transferred from the minutes of the Court, to the back of the deed, by the Clerk, who also certified its having been recorded.

The defendants below, objected to the reading of the deed to the jury, on the ground that it was not proved, acknowledged, and recorded, in pursuance of the statute. The Court overruled the objection, and a verdict and judgment were rendered for the defendant in error.

The plaintiffs in error took their bill of exceptions to the decision of the Court on this point, and assigned the same in this Court.

HOPKINS, for Plaintiffs in error—cited 1 *Peters' R.* 340, 341, 342—2 *Stew.* 490

CRAIGHEAD, *contra.*

By Mr. Justice HITCHCOCK.

This is an action of trespass, to try titles; brought by John H. Lewis against Mathias Munn and John Griffin, in the Circuit Court of Madison county, to recover possession of a lot of ground in the town of Huntsville, in said county.

The suit was tried at the October term, 1832, of said Court, and a verdict was had for the plaintiff, for the lot in question, and for one hundred and seventy eight dollars and eighty three cents, for damages; for which a judgment was rendered, and the case is brought here by writ of error.

At the trial of the cause below, the plaintiff, as part of his chain of title, offered in evidence a deed of trust,

for the land in question, dated the 27th of August, 1827, purporting to be executed by Munn to James Penn as trustee, to secure one John Tayloe in the sum of six hundred and twenty-five dollars, which he was indebted to him. On the back of the deed, the following certificates appeared: "State of Alabama, County Court of Madison County, August term 1827. A deed of trust from Mathias Munn to James Penn, for the benefit of John Tayloe, dated 22d August, 1827, for certain purposes, and property therein specified, was this day produced in open Court, and the execution thereof being duly acknowledged by the parties thereto, the same is ordered to be recorded," &c.—"A copy from the minutes, Thomas Brandon, Clerk."—"The foregoing deed of trust was duly recorded in the office of the Clerk of the County Court of Madison county, the 29th of September, 1827—Thomas Brandon, Clerk." No other proof was offered, of the execution of the deed, than what appears from the above entries and certificate. The reading of this deed was objected to, by the defendants below, but the objection was overruled, and the deed was admitted as evidence, and was read to the jury; to which a bill of exceptions was taken, and which is assigned for error in this Court.

By various statutes which have been enacted from time to time, in this state, from 1803 to 1823, Judges of the Circuit Court, Justices of the County Courts, Clerks of the Circuit and County Courts, Notaries Public, and two Justices of the Peace, are respectively authorised to take the acknowledgments of the parties, relinquishments of dower, and proof by subscribing witnesses to deeds and conveyances of lands, tenements and hereditaments, lying within this state; and certificates of acknowledgment or proofs, written upon or under said deeds and conveyances, and *signed*

by the person before whom it was made, shall entitle said deed to be read in evidence in any court of this state, in the same manner as if the same were then and there produced and proved.*

* Aik. Dig. 88,
89 & 90.

By the second section of the act to prevent frauds and fraudulent conveyances,^b it is declared, "that if ^bAik. Dig. 307 any conveyance be of goods or chattels, and be *not on consideration, deemed valuable in the law*, it shall be taken to be fraudulent within this act, unless the same be by will duly proved^c and recorded. *If the same deed include lands, also in such manner as conveyances of lands are by law, directed to be acknowledged and proved*; or if it be of goods and chattels only, then acknowledged or proved by one or more witnesses in the Superior Court or *County Court*, wherein one of the parties lives, within twelve months after the execution thereof." And by the third section of the act, it is declared, that "this act shall not extend to any estate or interest in any lands, goods or chattels, or any rents-common, or profit out of the same, which shall be upon *good consideration*, and *bona fide*, lawfully conveyed, or assured, to any person or persons, bodies politic or corporate."

These are all the statutes we have, relating to the acknowledgment and proof of deeds, in this state. The term *good consideration*, referred to in the third section of the last recited act, has been uniformly held to be synonymous with the term *valuable consideration*; and as the provisions of the second section, authorising the acknowledgment of deeds before the *County Court*, is confined to *deeds of goods and chattels* only, and requires them, when they include lands also, though upon consideration not *deemed valuable in the law*, to be acknowledged or proved, in such manner as conveyances of land are by law directed, it follows, necessarily, that no deed of any kind,

where lands are conveyed, can be acknowledged before the *County Court*. It must be done before one of the persons designated above, and a certificate on or under the deed signed by him, must accompany it, shewing that the requisites of the law have been complied with.

In this case, the acknowledgment was made before the County Court, in open Court, and the entry made on the minutes of the Court, and not on the deed. It does not purport to be the act of the clerk, and the Court as such, could not direct the clerk to make the entry, and the clerk, as such, had no right to transfer the entry to the back of the deed. It cannot, therefore, be regarded as the act of the clerk, for he may not have seen the parties when the acknowledgment was made. It cannot be regarded as the act of the Judge, as he did not sign it, and perhaps does not know that the entry has been transferred to the back of the deed. It is true, that both the Judge and the Clerk are authorised to take the acknowledgment of deeds: but, in the performance of the act, it is done in the exercise of a distinct, independent, and personal authority, upon the individual judgment and responsibility of the person before whom the acknowledgment is made, in which the officer acts ministerially, and not judicially; and when the authority is exercised, and the certificate is made, the authority itself is exhausted, and the act becomes fixed, permanent, and unalterable: it goes with the deed wherever it goes, and is an indispensable pre-requisite to its being admitted to record. This is the view taken in a similar case, by the Supreme Court of the United States—*Elliott et al. vs. Peirsol et al.**

*1 Peters, 340.

The acts authorising the acknowledgment of deeds, though of great public convenience, are yet in derogation of the common law, taking away the right of a

personal examination of the party who made, and of the witnesses who saw the execution of the deed; and therefore, they must be strictly complied with.

Whether a certificate, such as this, is made and signed by a person authorised to take the acknowledgment of deeds, would be a sufficient compliance with the statute, in as much as it does not state that the party appeared and acknowledged that he "signed, sealed, and delivered" the instrument in question, but only, that the deed was produced, and "being duly acknowledged by the parties thereto," was, &c. is a question, though suggested in argument, not necessary to the decision of this cause, and therefore, no opinion is expressed.

The recording of the deed, and the certificate of the clerk of such record, on the deed, gives no validity to the act; and it being the opinion of the Court that the acknowledgment is void, it follows that there was error in the Circuit Court in admitting it as evidence: for which, the judgment must be reversed, and the cause remanded.

JOHNSON, Survivor, *versus* BALLEW. Adm'r.

A bill of exceptions must show affirmatively the existence of the error, of which a party complains, and the appellate Court will not presume facts which do not appear.

When there is no ambiguity apparent on the face of an instrument—nor any intimation given of a disclosure of a *latent ambiguity*, the refusal of an inferior Court, to admit parol testimony to explain such instrument, is not error.

It is not competent for a witness to give testimony as to *Whether, a particular language used was calculated to produce fear in the mind of one, so as to induce him to execute a paper.* What that language was, must be submitted to the jury, from which their own inferences are to be drawn.

THIS case was brought into the Supreme Court by writ of error from the Circuit Court of Morgan. It

was an action of assumpsit, commenced by the intestate of the defendant in error, to recover for work and labor, performed for the plaintiff here, and his deceased partner. The account rendered against the plaintiff in error, was acknowledged in writing, by Johnson, to be correct, both as to prices and the execution of the work. A verdict and judgment were rendered for the defendant in error, and by a bill of exceptions the case was brought to this Court for revision.

S. PARSONS, for Plaintiff—contended, that there was error in the judgment below.

1st. Because the acknowledgment was not proved by the subscribing witness.

2d. Because the Court rejected evidence that the acknowledgment was obtained by duress.

If the Court had admitted the evidence of duress, *as offered*, the same could have been perfected, if incomplete, by other testimony.

Duress may be given in evidence under the general issue.—1 *Chitty's Pl.* 470.

CRAIGHEAD, *contra*, said—It did not appear from the bill of exceptions, but that the acknowledgment was proved, and the items established.

A bill of exceptions does not necessarily show all the testimony, and it was the business of the party excepting, to show, that the hand-writing of Johnson was not proved.

As to the duress, the party offered to prove what was the *opinion* of the witness, in respect to the language used, which was surely inadmissible.

The doctrine of duress requires, that the language or conduct should be such as would put a man of ordinary courage in fear; and the mere opinion of the

witness that the language used *might excite fear*, was properly rejected.—1 *Black*. 131.

By Mr. Chief-Justice SAFFOLD :

Colley, in his life time, instituted an action of *assumpsit* against Johnson, as surviving partner of Moseley, and said Johnson, to recover an account against them for more than nine hundred dollars, for work and labor done and performed. Colley having died pending the suit, it was further prosecuted by Ballew, as his administrator, and being tried in the Circuit Court, on the general issue, a recovery was had against the surviving partner, from which he prosecutes this writ of error. The questions for consideration, arise on a bill of exceptions. The first of which, according to the assignments of error, is—

Was the account and acknowledgment, signed by Johnson, admissible as evidence ?

The account in question appears to have been regularly stated, charging William Moseley and Harmon A. Johnson as debtors to Gabriel Colley. The account contains the various items, with the price of each, amounting to nine hundred and ninety one dollars and twenty cents; to which is subjoined the following: "I acknowledge that the above items of work were done by Mr. Gabriel Colley; and further, believe that the price annexed to each item, is correct, as to myself individually."—Signed H. A. Johnson—dated and attested. To the introduction of this evidence, the defendant objected; but the Court admitted it.

The main objection now urged against it, is, that it was admitted without proof of the hand-writing of the defendant. It is found true, as contended in argument, that this fact does not appear, nor is it to be presumed. The bill of exceptions does not purport to contain all the evidence, and this exception is not

shown to have been taken below. The party excepting, is required to show affirmatively the existence of the error, of which he complains. The objection relied upon below, may have been entirely different; and something in which the plaintiff in error now has not sufficient confidence to bring it to the notice of the Court. No other available objection is apparent to the Court. The fact, that the acknowledgment was made by the surviving partner, or one partner alone, could not legally exclude it. The evidence was at least *relevant*, as conducing to prove the issue, whether the acknowledgment was absolute, or in terms of *belief* merely—Whether it, admitted only that the work was done, or *that*, together with the reasonableness of the prices. The question would have been different, if presented, whether this evidence alone was sufficient, or whether the defendant would have been entitled to resist the force of this acknowledgment by proof of fraud or mistake in obtaining it, or of any subsequent matter destroying the justice of the demand; but no such questions appear to have arisen in the case.

2. The second assignment is, that the Court refused to permit parol evidence, to explain a supposed ambiguity in the written acknowledgment.

On this, it is sufficient to say, there is no ambiguity in the instrument, apparent on the face of it, nor any intimation given of the nature of the supposed defect, showing the object to have been, to disclose a *latent* ambiguity: the latter, only, is by law susceptible of explanation by parol; and the character of this instrument would scarcely admit of such an ambiguity.

3. The last assignment, is, that the Court rejected evidence of the language of Colly, upon the occasion of the defendants' signing the acknowledgment.

On this point, the facts are, that the defendant proved Colley to have been a desperate man, and that at the time the acknowledgment was obtained, he was in a great passion; also, that the defendant knew his character, and was a timid man; but the witness did not recollect the precise language used by Colley. The evidence rejected, was no other than the answer of the witness to the question, *whether the language of Colley was calculated to produce fear* in the mind of Johnson, and thereby induce him to sign the paper, not what the language was, from which the jury could have drawn their own inferences. The effect of this evidence would have been, to make the inferences or conclusions of the witness, evidence of a fact, for the government of a jury. Without further scrutiny into the legality of this evidence, this view of it alone, shows it to have been clearly inadmissible.

There was no error in the proceedings of the Court below, and the judgment must be affirmed.

McELDERY AND CHAPMAN, Ex'ors *versus* McKENZIE.

Executors or administrators, by virtue of their general powers as such, cannot make any contract in their representative character, which at law, will bind the estate, and authorise a judgment *de bonis testatoris*.

If an executor or administrator contracts for necessary matters relating to an estate, he does so on his personal responsibility, and the action to recover thereon, must be against him individually.

THIS was an action of assumpsit, in the Circuit Court of Morgan against McEldery and Chapman, executors of Goodhue's estate. The cause of action declared on, was work and labor for the estate of Goodhue, performed at the instance of the executors.

McEldery alone appeared, and plead "non-assumpsit and set off," and a judgment was rendered against both executors, *de bonis testatoris*. On trial, the Court charged the jury, that if they believed the work and labor was beneficial to the estate, it was chargeable to the defendants below, in their representative capacity as executors, and not to them as individuals; and that such evidence would sustain the action. The defendants below excepted to this charge, and took a writ of error to this Court.

S. PARSONS, for Plaintiff—Insisted, that a party making a contract with executors, but not in their representative character, must recover against them individually.

In this case, the contract was made with, and executed for the executors, and not for the testator: therefore, recovery cannot be had against the executors in their representative capacity.—1 *Chitty's Pl.* 205.

As it is clear the executors were liable for their contract individually, the question arises, has the defendant in error a double right of action?

A contract entered into by executors individually, for the benefit of an estate, might be allowed by the Orphans' Court on settlement; but at law, does not found a right of action against them as *executors*.

HOPKINS, *contra*—Contended, that the services performed were for the benefit of the estate, and it followed, that the contractors were liable to an action in their representative character.

If the Court below, in so instructing the jury, laid down the doctrine too broad, it is not available in error.—*Wilson vs. Jackson*—(*Ala. Rep.* 399.)

If the services rendered were for the benefit of the estate, of course the persons rendering them ought to

have their right of action against the estate, because the services might be essential, and the executors insolvent; and but for the remedy on the estate, the services would not be performed at all.—Cited 2 *Henn. & Munf.* 55—*Chitty on Bills*, 490; *Note* 2,—*ib.* 499, *Note n.*

By Mr. Justice HITCHCOCK.

Murdock M. McKenzie brought an action of assumpsit, in the Circuit Court of Morgan county, against Thomas McEldery and Reuben Chapman, executors of William S. Goodhue, and declared against them for work and labor done by him for them as executors of said estate, at their instance and request, in and about the settlement of the estate of the said Goodhue. The declaration avers a liability, and *super se* assumpsit, in the common form. McEldery pleaded in short, “non-assumpsit, and set-off,” to which there was a replication and issue, in short. The cause was tried at March term, 1833, and a verdict was had in favor of the plaintiff against both defendants, for the sum of eighty-eight dollars and fifty-five cents, and a judgment *de bonis testatoris* was rendered thereon. No notice appears to have been taken of the failure of Chapman to plead.

At the trial, two bills of exceptions were taken to the opinion of the Court. In the first, and only one which it will be necessary for the Court to notice, it is stated, that “it was proved that the work and labor done, and which is sued for, was done at the request of the executors, as set forth in an account which is made part of the bill of exceptions, and which appears to be principally for posting up the books of the testator: upon which evidence the Court charged the jury, that if they believed that the work done was such as was beneficial to the estate, that, in that case, it was char-

geable to them in their representative capacity of executors, and not to them as individuals; and that such evidence did sustain the action against them in their representative capacity."

The case appears to have been treated by the plaintiffs, and the Court below, as a suit against them as executors, and the charge of the Court directly involves the question, whether an executor or administrator, by virtue of their general powers as such, can make any contract in their representative character, which at law, will bind the estate, and authorise a judgment *de bonis testatoris*.

*Ala. Rep. 276. This Court, in the case of *Greening vs. Sheffield*, at December term, 1824, where the defendant had given his note as executor, and was sued in his representative capacity, decided, "that in a court of law, the estate could not be charged in such a contract"—that *Greening*, the defendant, though liable in an action properly brought against him in his individual character, could not be made liable in the action against him as executor. This decision is decisive of this case: for if an executor cannot give a note to bind the estate, he cannot make any other contract in law to bind it. The limitation which the Court, in this case, has placed upon the plaintiffs' right, "that he should show that the work was beneficial to the estate," cannot affect the case. It is a very proper inquiry, as between the executor and the County Court, when the executor presents his accounts for final settlement. But to say that the plaintiffs' right to recover for work and labor faithfully performed, shall depend upon the benefit which the estate shall have derived from that labor, would be establishing a new principle in the law of contracts, not heretofore known.

If the executor is able to contract and bind the

estate, the evidence of such contract and performance of the stipulations under it, by the plaintiff, would entitle him to recover. If he is not able to contract, except under the above restriction, then it would seem to follow, that he cannot contract at all. That an executor or administrator can, at his discretion, employ workmen, make contracts, give notes and bonds, *ad libitum*, and bind the estate, and where there are more than one, bind all in that capacity, is a principle that seems only necessary to be stated, to be rejected. That an executor or administrator may contract for all necessary matters relating to an estate, cannot be doubted, but that he does so on his personal responsibility; and the action to recover on such contract, at law, must be against him individually, is equally clear.

That there are cases in which a court of equity would charge the estate, there can be no doubt; but where the executor is living, liable to be sued, and for aught that appears, able to pay, the remedy is against him individually.

In this case, the action is against both executors: only one has pleaded. The evidence is, that the work was done at the instance of one, and which one does not appear; and the judgment is against both, and the estate is charged. So much error, in so short a case, does not commonly occur.

The judgment must be reversed; and as the action is misconceived, the case cannot be remanded.

WALTERS *versus* COMMONS.

The United States, in providing for the survey of the public domain, established the rule, that *sections* of lands should be held to contain the exact quantity returned by the Surveyor-General: so, that the corners of *sections* fixed by such survey, cannot be removed.

In the case of *sections*, the government has arranged their boundaries, marked their lines and corners, and declared the contents; and the purchaser of an *entire section* takes all within those limits, be it more or less than the quantity returned by the surveyor: but in the purchase of a *less* quantity than a section, (as between the several holders of a section,) the contents of such several parts must be determined by reference to the entire section: and the purchaser, of a half or quarter section, is entitled to one half or one fourth of whatever the section contains. In such case the half mile posts or corners are to be placed equi-distant between the corners of a section; for these half mile posts are not definitively fixed by law, as in the case of section corners.

THIS was an action of trespass, to try title, instituted by Walters against Commons, in the Circuit Court of Perry.

Walters was owner of the south east quarter of section eight, in township eighteen, of range ten, and Commons claimed the east half of the south west quarter of the same section. The whole section was found to contain six hundred and fifty two 37-100 acres, and the question raised in this case, was, in substance, whether the surveyors had the right of removing the *half mile posts*, and of thus giving the plaintiff his portion of the excess in the section. The Court below, charged, among other things, that the surveyors had no right to remove the half mile stakes, if without doing so, they could give the quantity called for in the patent, though the section contained more than six hundred and forty acres. There was a judgment for defendant below, and the plaintiff having excepted to the opinion of the Court, took his writ of error.

ELLIS & PECK, for Pl'ff—cited *Story's Dig.* 360, '1.

By Mr. Justice HITCHCOCK:

This is an action brought by the plaintiff in error, in the Circuit Court of Perry county, to recover possession of a piece of land in possession of, and claimed by the defendant. At the trial below, a bill of exceptions was taken, which presents the following state of facts.

The plaintiff gave in evidence a patent from the United States, for the south east quarter of section eight, township eighteen, range ten, containing one hundred and sixty 70-100 acres, and that the defendant was in possession of, and claimed the east half of the south west quarter of the same section. He further proved, that by an accurate survey of the whole section, it was found to contain six hundred and fifty two 37-100 acres, and that to give the plaintiff one fourth of this section, it would take about one and a half acres from that in possession of, and enclosed by the defendant. It appeared, by the evidence of the county surveyor, that the half mile stake on the south line of the section was missing; but that by running a line from where he supposed it to have been, judging from the fore and aft trees, north, to the middle of the section, and from thence east to the east line of the section, there would be found within those lines the quantity called for by the plaintiff's patent, and that that those lines so run, would not bring the defendant within them—but that by placing the half mile stake at the centre of the south line of the section, and thence running to the centre of the section, so as to give the plaintiff one fourth of the entire section, it would take, as before stated, one and one half acres of the defendant's possessions.

Upon this state of facts, the Court below instructed the jury, that if by running the line from the half mile stake, or if missing, from where it was supposed to

have been, from the fore and aft trees, on the south line, north, to the middle of the section, and thence to the half mile stake on the east line of the section, the same would contain the number of acres the patent called for—that that was all the plaintiff was entitled to, though it might be less than a fourth of the section, and that in re-surveying the lands sold by the United States, in this state, the surveyors have no right to remove the half mile stakes, if without it, they can give to the party holding the patent the number of acres called for therein, though the section may contain more than six hundred and forty acres; and though, if the section were equally divided, according to the legal sub-divisions of the United States, he would be entitled to a larger quantity.

The correctness of this instruction, is brought before this Court for examination, and the case has been submitted without argument.

The titles to lands in this state, are derived from grants by the United States, and are made under surveys regulated by laws of the United States. By the act of 1796, providing for the sale of the lands of the United States north of the river Ohio, and which is the parent act of all our land laws, the principles upon which surveys are made, are prescribed. By the second section of that act, the lands are to be divided by north and south lines, run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square. The corners of the townships are to be marked with progressive numbers from the beginning; each distance of a mile between the corners shall be distinctly marked with marks different from those of the corners.—These townships are to be divided into sections containing, *nearly as may be, six hundred and forty acres*, by running through the same, each way, parallel lines,

at the end of every two miles, and by marking a corner on each of said lines at the end of every mile. The sections are to be numbered, respectively, beginning with number one in the north east section, and proceeding west and east alternately, through the township, with progressive numbers till the thirty-six be completed; and the surveyors are to mark on a tree near each corner made as aforesaid, and within each section, the number of the section, and over it the number of the township in which said section may be, and all lines are to be plainly marked upon trees, and measured with chains, &c. according to a standard fixed by the act.

By an act passed the 11th February, 1805, the surveyors were required, by running intermediate lines, to subdivide the lands into sections, half sections, and quarter sections, and by that act certain principles were established, by which to ascertain the boundaries and contents of the several subdivisions. 3d Vol. Law's
U. S. p. 637.

The first principle declares, "that all the corners marked in the surveys shall be established as the proper corners of sections or subdivisions of sections which they were intended to designate; and the corners of half and quarter sections, not marked on the said surveys, shall be placed, as nearly as possible, equidistant from those two corners which stand on the same line."

By the second principle, each section or subdivision of section, the contents of which shall have been returned by the Surveyor-General, shall be held and considered to contain the exact quantity expressed in the return so made; and the half sections and quarter sections, the contents whereof shall not have been returned, shall be held and considered as containing the

CASES DETERMINED

WALTERS vs. COMMONS.

one half or the one fourth, respectively, of the returned contents of the section of which they make a part.

By this it will be seen that the corners of sections are definitively established, and cannot be altered; that the half and quarter sections are not actually run out, but that the half mile corners are to be placed, as nearly as possible, equidistant between the corners of sections, and that the purchaser of a half or quarter section will be entitled to the half or quarter of the returned contents of the section of which it forms a part. It so happens, however, that a section sometimes contains more, than by the returned contents from the surveys, it appears to have, and in some cases less. In the present case, it contains twelve 37-100 acres more, than that prescribed by law.—Where there are different owners in the same section, how is this excess to be divided? If the half mile posts or corners are equidistant between the corners of the section, there can be no difficulty: for, by running to the exact center of the section, from each post, the parts will be equal. It is only when there is an error in not placing the half mile post or corner at the center of the line of the section, that the inequality occurs. By law, these corners are not declared to be “established as the proper corners,” as is done in the case of sections; to disturb which would distract a whole township: but they are to be as “nearly equidistant as possible from the corners of the section;” and if there is an error found in that particular, by which one person owning one half or quarter of a section, has got possession of more than the half or quarter, it is the opinion of the Court that this error can be corrected. The propriety of this distinction is obvious. In the case of sections, the government has fixed and established the boundaries, marked the lines,

and designated and marked the corners, and declared the contents; and a purchaser of a section takes it by metes and bounds, and is entitled to all within those bounds, whatever it may be : but in the purchase of a less quantity, although the government declares what the contents are, yet, as between the several holders of the section, their rights are to be determined by reference to the entire section ; their boundaries are not determined by metes and bounds designated and established by the government ; for as to those, there are no returns, but the same is determined by reference to the section, as before stated.

The expression in the act, that the sections and subdivisions shall be held and considered as " containing the exact quantity expressed in the returns," is equivalent to the expression in a deed, conveying lands by metes and bounds, and stating the quantity of acres, " be the same more or less." Here, the purchaser takes what is within the bounds, without reference to the exact amount there may happen to be.

From this view of the case, it follows, that the Circuit Court erred in its instruction to the jury ; and, therefore, the cause must be reversed, and remanded.

HUTCHISON, Executor versus TOLLS.

Syllable—The effect of the act of 1806, which prohibits any action from being brought against an executor or administrator within six months from the time of proving the will or granting letters of administration—should be, to suspend for that time, the running of the statute of limitations. But, Where, in an action brought against an executor, to recover a debt due by his testator, a replication to a plea of the statute of limitations only alleged that letters testamentary were not granted to the executor until more than two years after the testator's decease—Held: That this replication was bad, and was no bar to the plea; because, only averring that letters testamentary were not granted for so long a period, left the legal presumption uncontradicted, that letters of one kind or another, had been previously issued.

THIS action was instituted by Tolls, in the County Court of Madison, to recover of the plaintiff in error, the amount of an account due by his testator. The defendant below, filed the plea of the statute of limitations, to which there was a special replication. The action was commenced something over four years after the death of the testator, and the replication averred that letters testamentary had not been granted until over two years after that event,—which, added to the six months during which the writ could not be issued against the executor, it was contended, barred the action of the statute.

The defendant below, having demurred to this replication, the same was overruled, and he took his writ of error to this Court.

HOPKINS, for Plaintiff—cited *Aikin's Dig.* 176—
1 *Stewart's Rep.* 254.

By Mr. Justice THORNTON.

This case comes up by writ of error from the County Court of Madison county, to reverse a judgment of said Court, in favor of the defendant in error; and

the only error assigned, is, that the Court below erred in overruling a demurrer to a replication to the plea of the statute of limitations of three years, the action being assumpsit upon an open account, for board, &c. furnished the testator of the plaintiff in error. The replication contains the averments—that the testator departed this life in July, 1826, and that letters testamentary were not granted to the plaintiff in error, or to any other person upon the testator's estate, until the 22d of September, 1828; that the time from the death of the testator, to the time of his said promise in the plaintiff's declaration mentioned, and the time from the commencement of the action, to the period of six months after the issuance of letters testamentary to the plaintiff in error; does not amount to three years; that the action was not barred before the death of testator, nor has it been barred since granting letters testamentary to the plaintiff in error. It does not appear when the action accrued, but take it as having done so, at the death of the testator, which is the most favorable supposition for the defendant in error, and four years and one month had elapsed before the issuance of the writ in this cause. The replication admits that the statute had begun to run in the lifetime of the testator. There is no provision in the statute itself, which saves the running of it, in the case of the death of the person liable to the suit; and the general rule is well established, that when it begins, it goes on, till it operates as a complete bar: yet, I am inclined to the opinion, that the effect of the act of 1806, respecting the estates of deceased persons,* which prohibits any action from being brought against an executor or administrator, until six months shall have expired from the time of proving the will of the testator, or of granting letters of administration on the estate of the deceased, should be, to suspend for

Aik. Dig. 159

that time, the running of the statute of limitations. For, though the language of the statute is, that no action shall be brought to recover any money due by open account, after the expiration of three years from the accruing of the cause of action ; I feel persuaded that the computation should be so made, as not to embrace a period, even after the statute has begun to run, during which there was no person potentially existing, against whom a suit could be maintained—

o *Lex non cogit ad impossibilia.* Here, for the space of six months after probate of a will, or letters of administration granted, a legal incapacity is imposed on the creditor ; the effect of which is, to modify the statute of limitations in such cases. I am not prepared to say what is the greatest length of time which may transpire in case of the intervening death of a debtor ; to be abstracted from the reckoning of the statute ; though I am satisfied that such reckoning should be made without reference to the fact, that in a certain contingency, the creditor himself could obtain letters of administration on the estate. There is no doubt that a disability to sue, which is justly imputable to the creditor, would be disregarded ; as if she be a *feme sole*, and after action accrued, marry : the period of her coverture would not be rejected in the computation : many persons may be creditors of an estate, who may be be wholly unworthy, if they could comply with the requisites of the law in all other respects. If a creditor die, twelve months has been adopted as a period, within which, his representative may sue for any demand due to the testator or intestate, although the statute may have commenced running in his lifetime, and would have perfected the bar within the twelve months, if he had lived. This adoption of time, in favor of the representatives of a deceased creditor, has grown up, under an equitable construction of the

English statute of limitations of 21st *James I. sec. 4*, in that country, and has been recognised in our state, from a view of its propriety: our statute, containing the same clause as that in 21 *James I. sec. 4*. For the gradual progress of this exception to the statute of limitations, till its settlement as above stated—see *Salk.* 424, 425—2 *Strange*, 907—1 *Dallas*, 413—1 *Wash'n.* 303, and 1 *Stewt.* 254.

If the disability to sue be created by the death of the debtor, the statute expressly continues that disability, as we have seen, till six months after probate of his will, if he left one, or after letters of administration granted on his estate. The precise time is not definitely fixed, so that it cannot vary. But if the Judge of the County Court do his duty, it cannot exceed nine months, in any case. For forty days, the appointment of any one as personal representative, is left open, to be availed by the parties entitled under the statute, according to an order of succession therein designated. If no one take letters as there authorised, then, after delaying only as much time more, as will finish out three months from the death of the debtor, the Judge of the County Court shall commit the administration to the sheriff or coroner. Full power, however, exists, to supply a temporary representative in almost every supposable case, during the delays which are contemplated in the act.* It is to be presumed, that in three months, some representative of the deceased, either executor or administrator, will be appointed: the addition of the six months to which time, making nine months, may be looked upon as the period, which, by a necessary construction of the statute of limitations, as affected by the acts above referred to, may be said to be excepted from computation: though, as I have stated above, a longer time must be omitted, where, from the neglect of the Judge

*Aik. Dig. 176,
179, § 1 & 10.

of the County Court, or other cause not imputable to the creditor, such longer time has elapsed, before any one existed against whom the action could be brought. The presumption, that in the case of the plaintiff's testator, the necessary appointment of an administrator was conferred upon some one, is not rebutted by any averment in the replication. The bar was relied upon, and should have been avoided by matter positively alleged, or at least of reasonable probability. The replication only avers that letters testamentary, were not issued to the executor, until after two years and nearly two months had expired since the death of his testator, and insists, that this time, with the addition of the six months, should be rejected, which being done, would obviate the bar of the statute.

The replication is clearly defective, because only averring that letters testamentary, were not granted for so long a period, leaves the legal presumption uncontradicted, that letters of administration of one kind, or another, had been previously issued.

Let the judgment be reversed, and the cause remanded for further plea.

HAGEN versus THOMPSON.

Cases carried from Justices Courts into the Circuit or County Courts, by *certiorari* or appeal, are triable *de novo* on their merits and equity; and a payment made after the rendition of a judgment by a magistrate, is available, without a special plea *puis darrein continuance*.

THIS action was commenced before a Justice of the Peace in Bibb county—taken to the County Court by *certiorari*, and thence by writ of error to the Circuit Court.

The Court was requested to charge the jury, that a payment after the rendition of judgment by the magistrate, could not be pleaded, except by plea *pais darrein continuance*. The Judge refused to give this charge, but instructed the jury that the defence of payment was good without such special plea. To this, exception was taken, and the case, by writ of error, brought into this Court.

PICKENS, for Plaintiff.

MARTIN, *contra*—cited *Aikin's Digest*, 261.

By Mr. Justice THORNTON:

This action was commenced before a justice of the peace, and was brought into the County Court of Bibb county, by *certiorari*; where, during the trial, a bill of exceptions was signed. It was then taken by writ of error into the Circuit Court; and upon errors there assigned, the judgment of the County Court was affirmed: from which judgment, a writ of error is brought to this Court.

The assignment of error here, only embraces the matter originally excepted to in the County Court, which was the refusing, and giving of instructions to the jury, as disclosed in the bill of exceptions. The charge asked, was, to instruct, that if they believed from the testimony, that the defendant had proved no payment on the note declared on, except payments made after the commencement of the suit, and rendition of judgment by the justice of the peace, that the pleas of the defendant, pleaded in bar of the action generally, were not supported by such proof; that such defence could only be pleaded by way of plea of *pais darrein continuance*; and that they must, in that event, return a verdict for the plaintiff. This, the Court refused—but charged, that if they believed

from the evidence, that the debt was satisfied, even after such judgment rendered, and before the cause was brought into that Court, that the defence was maintainable under the issues joined.

After a case, from a Justice of the Peace, is brought into the County or Circuit Court, whether by appeal, or *certiorari*, it is to be tried *de novo*, as if it had originated in that Court: and the validity of the payment here sought to be established, may be tested by considering the case in that point of light. It seems to be admitted, that by a proper form of plea, this defence could have been availed: if it could, by any plea to the action, technically pleaded, it is admissible, we think, under the pleadings in this case; for, the act requiring the cause to be tried on its merits, according to the equity and justice of the case, upon an issue to be formed under the direction of the Court, has been often determined not to require critical accuracy in the pleadings, either as it respects the statement on the one hand, or the plea on the other. The proceedings had before the magistrate, after the case comes up for trial, *de novo*, whether by appeal or *certiorari*, are merely introductory to that trial, and may be assimilated to mesne process, in an ordinary action. Now, payment and satisfaction of the cause of action, like a release, is available, though made pending the writ.

From this view of the case, we think there is no error, and that the judgment must be affirmed.

HUNTINGTON *versus* BELL, et al.

Where executions are issued against personal property, which has been claimed by a third person, under the statute, and before the trial of the right is determined, other executions are issued upon the same judgment, and levied upon the same property—an injunction will lie to restrain proceedings on the latter.

THIS case originated in a bill for injunction, filed by Huntington against Bell, *et al*, in the Circuit Court of Dallas. The bill disclosed—that sundry executions had been levied on a slave of the complainant, as the property of one Miller, upon a judgment against him, and that on trial of the right of property, in pursuance of the statute, a verdict was rendered in favor of complainant, from which an appeal was taken to the Circuit Court. That before any final adjudication of the cause, three other executions were issued on the same judgment, and levied on the same slave, to restrain which, the injunction was prayed. The Court below, rendered a decree dissolving the injunction, and Huntington, by writ of error, brought the case into this Court.

PICKENS, for Plaintiff.—The Court below, sustained the demurrer to the bill, on the ground, it is supposed, that the complainant had a remedy at law. The party, it is true, might not be left wholly without remedy at law; but the relief sought is preventive relief: it is to restrain the defendant from carrying into effect a sale, by which the complainant might sustain much injury. The kind of relief sought, is different from that which might afterwards be obtained by way of damages from a court of law. This is one of the appropriate offices of a court of chancery, interposing its power to give present relief, to prevent

mischief, multiplicity of actions, and unnecessary litigation. Huntington only asked for a stay of injurious proceedings against him, until a trial of the right of property could be had, which was then pending.

By Mr. Justice THORNTON :

This cause is brought up by writ of error, to a decree of a chancellor, dissolving an injunction, and dissolving a bill filed by the plaintiff in error against the defendants. The final decree was pronounced upon a demurrer to the bill, and no reasons are assigned for which the decree was entered. The matters in the bill are to be taken as all true ; and they present a case, we think, which called for the aid of the protecting powers of a court of equity.

Three executions from a justice of the peace, on judgments rendered in favor of the defendant, Bell, were levied upon a negro slave, as the property of one Stephen Miller, the defendant in said executions : whereupon, a claim to the said slave was preferred by the complainant, according to the statute regulating the trial of the right of property ; and by the verdict of a jury, the claim was sustained, and the slave declared not to be liable to the satisfaction of the executions. It seems that an appeal was taken to the Circuit Court, from the said decision of a jury, and that before any final trial of that matter, three *alias fi. fas.* were issued upon the same judgments, and levied a second time upon the same slave. The bill prays, to enjoin the defendant, Bell, from further proceedings on his said executions against the said slave, until the appeal should be finally heard, and for such other relief as might seem meet.

The statute allows a plaintiff in execution, after a levy and claim of the property by a third person, to issue other executions on his judgment, to be levied

on other property than that claimed ; but to allow the same property to be taken by such second execution, especially after a verdict that it is not liable, would be making a mere farce of the whole proceeding under the act. We must presume that, in the dissolution of the injunction, and dismissal of the bill by the chancellor below, he was influenced by the consideration, that an adequate remedy could be pursued by the complainant in the courts of law ; for, the matters disclosed in the bill evidently show a manifest abuse of legal process, greatly to the injury of the complainant. I cannot perceive, however, any strictly legal course, by which redress could be afforded to him. A *supersedeas* of these executions could not be effected by a prayer for that writ to a Judge of a Circuit or County Court ; for that prayer is only granted, where, from an inspection of the record, it would seem that an execution had improperly issued. If the *memoranda* in the justice's book could be dignified with the name of a record, which I believe has never been allowed, yet the matters which, altogether, form the ground of the relief sought here, would not appear in such a transcript. The fact, that the appeal taken to the trial of the right of property, has not yet been determined adversely to the complainant, would not appear : nor could the execution be restrained in that mode of procedure, from a particular subject : it would be either not superseded at all, or superseded *in toto* ; which last would be an injury to the plaintiff in execution, not warranted by the law. A *certiorari* of the case would only result in a trial *de novo*, which would not reach the complaint ; because, no matter which merely goes to suspend an execution, or to divert it from a particular subject, could constitute a bar to the action. The *audita querela*, has been superseded by the express decisions

of this Court, if it were an appropriate remedy for the abuse of process, from a justice of the peace. The only remedy, I apprehend, which can be afforded, is furnished by the bill of injunction; to which, the objection, that it relates, in cases like this, to a personal matter, and so could be compensated by an action at law for damages, has been solemnly overruled by this Court, as well as by other tribunals in the United States, of the highest legal authority. It is, therefore, decreed by this Court, that the decree below be reversed, the injunction be re-instated, and that the chancellor below, make such further orders and decrees, as the justice of the case may require, not inconsistent with the principles of this opinion.

HATCH *versus* CRAWFORD, Admr's.

An obligation or agreement signed between two or more parties, concluding "Given under our hands and seals," and containing a seal after the name of the first signer, (the other signing immediately under it,) is a *sealed instrument*, and *assumpsit* is not maintainable thereon.

HATCH declared, in *assumpsit*, in the Circuit Court of Franklin, against Crawford, on a written agreement, signed by himself and the defendant's intestate. The cause of action concluded, "*Given under our hands and seals*," and was signed by Hatch and Crawford, the latter immediately under the signature of the first. Following Hatch's name, there was a seal, but none to Crawford's. On the plea of general issue, a verdict was rendered for the defendant. In the progress of the trial, the Court below, excluded the agreement declared on, from the jury, on the

ground, that the same was a sealed instrument, and that *assumpsit* was not maintainable thereon. To this decision, the plaintiff excepted, and assigned the same as error in this Court.

PECK, for Plaintiff.—Although it is true, that where several covenant together to do *the same thing*, the seal of one may be construed to be the seal of all, yet in the case at bar the parties do not covenant to perform the same act. Their covenants are distinct and different, and they being on the same paper, cannot alter the case.

An action of covenant, could not, therefore, be maintained on defendant's agreement, because his agreement was not under seal.—*Comyn's Dig. title Fait*, 4th vol. 272—*Shep. Touch.* 56.

By Mr. Chief-Justice SAFFOLD :

The present plaintiff declared against Mary Crawford, as administratrix of the estate of James Crawford, deceased, *in assumpsit*. The cause of action is a memorandum of an agreement between said Hatch and James Crawford, the intestate, containing reciprocal stipulations for and against each of the parties, and concludes with these words : "Given under our hands and seals, this 30th day of September, 1830"—Signed, R. Hatch—James Crawford—one name being placed directly below the other : opposite the name of Hatch, a seal is affixed, which is the only one to the instrument. The declaration contains two counts : the first being special on the agreement, as in the case of a *simple contract* ; the second, for money lent and advanced.

The plea, was that of the general issue. On the trial a verdict and judgment were rendered for the defendant : upon which the plaintiff prosecutes this

writ of error. A bill of exceptions shows, that when the plaintiff offered in evidence the memorandum of the agreement as described, an objection being made to it by the defendant's counsel, the Circuit Court sustained the objection, and excluded it from the jury, upon the ground, that an action of *assumpsit* would not lie on such an instrument; the same being, in the opinion of that Court, *a sealed instrument*.

The exclusion of the instrument, is the cause assigned for error.

It is admitted, in argument, that any number of parties to a contract, may use the same seal; but, it is insisted, that they must make their several and distinct impressions, especially when they are opposite parties in the contract. Reference has been made to *Comyn's Digest, title Fait, 272, 273*—where it is said, "If there be mutual covenants between A and B, of the one part, and C and D, of the other, and B does not seal, yet covenant lies by him against C and D upon this deed; for he is made a party to the deed, and C and D covenanted with him." Also, that where a deed is written, as if intended to be executed by two persons, jointly and severally, and it be executed by one of them only, it will bind him, though not executed by the other.

Reference has also been made to *Sheppard's Touchstone*, where the principle is recognised that "If there be twenty to seal one deed, and they all seal upon one piece of wax, and with one seal, yet, if they make distinct and several prints, this is a very sufficient sealing, and the deed is good enough."

It is true, the cases here given, are slightly different in respect to the manner of the execution, from the one under consideration; but, they are to be regarded only as instances of informality, which affect

not the validity of the instrument; they do not prove that there can be no other irregularities of execution, which are equally immaterial.

The true doctrine is more fully explained in *Phil. Ev.* 1 v. 416. There, the principle is maintained, that where it is intended that several shall execute the same deed, one may seal for the rest, with their consent, and the deed will be as binding as if every one had put his several seal. As, "where one of two defendants, in the presence of the other, and by his authority, executed a bill of sale for them both, the two defendants being partners in the transaction, but there was only one seal, and it did not appear whether the seal had been put twice upon the wax, the *Court of King's Bench* held, that no particular mode of delivery was necessary; and that it was sufficient, if a party executing a deed, treated it as his own." 4 Term. Rep. 314.

The principle of the decision, in the case alluded to, appears to have rested mainly on the circumstance, that the deed had been executed by one of the parties for himself, and the other, in presence of both. This rule, is held to be applicable to all deeds at common law, and that such sealing will bind the parties, by whose authority the deed is executed. But the rule does not extend to deeds executed under a power, where the authority must be strictly and literally pursued.

In *Ludlow vs. Simons*,^b and in *MacKay vs. Bloodgood*,^c it was ruled, that several persons may bind themselves by one seal. ^b 2 Caine's C. E. 1.
^c 9 Johns. Rep. 285.

In relation to the case before us, it may be remarked, that the circumstance, of the instrument having expressed the intention of both parties, to execute it under their *hands and seals*—of its having contained mutual stipulations, binding both—and of its having been signed and sealed by the party of the first part;

then the execution at the same time by the other party, is a sufficient indication of the intention of the second party to execute it according to his import, and to bind himself with the same solemnity that he received the obligation of the other party. In legal contemplation, he is presumed, instead of affixing a second seal, to have adopted the one already annexed.

The judgment must be affirmed.

HATFIELD *versus* MONTGOMERY, et al.

In cases, where the absence of a subscribing witness to a deed is not accounted for, secondary evidence is not admissible, to prove the existence of such deed, or any defeasance connected therewith.

Where the allegations of a bill in chancery, were, *that a slave had been conveyed, with an agreement to allow the privilege of redeeming or repurchasing, to the party conveying*, and the conveyance was on its face, absolute, (the subscribing witness to which, was not produced, nor his absence accounted for,) and there was no positive testimony rebutting the implicit *denial of a defeasance*, by the answer; and a lapse of twenty six years had ensued, without excuse for the delay, the Court refused to disturb the sale.

The *assignee* of such person making the conveyance, held, not to be a competent witness, to prove the defeasance.

In the case of a mortgage, as in other deeds, in which fraud is alleged to have been committed, a party is not entitled to an unlimited time for the prosecution of his rights, *after his knowledge* of the existence of those rights, and of the fraud—but in such case, *after an unreasonable delay*, the law will presume a *payment or discharge of the equity*.

In this case a bill was filed in the Circuit Court of Jackson county, by Montgomery and Belcher, for the redemption of a negro slave.

The bill charged, that in the year 1807 or 1809, Hugh Montgomery, the father of the complainant Montgomery, conveyed to the defendant, Hatfield, a negro girl slave: that by an indorsement on the back of the conveyance, (the consideration whereof

was three hundred dollars,) and in consideration of three bushels of salt, the said Hugh had the privilege of *redeeming or repurchasing* the girl, at any time thereafter, on payment of the three hundred dollars and the interest. That afterwards, an offer to redeem was made by the agent of Hugh Montgomery; which offer was rejected by the plaintiff in error. The bill further alleged, that the said conveyance was intended as a mortgage, and that the interest therein of the said Hugh was by him assigned to the complainant, Montgomery, and half thereof by the latter, subsequently transferred to Belcher. It charged, that the indorsement of the condition, so made on the back of the conveyance as aforesaid, was fraudulently defaced by the plaintiff in error, and that the same remained in his possession. The bill was filed on the 5th day of June, 1830, and the only excuse for the delay was the allegation, that Hatfield had removed from the county in Tennessee, where the contract was made, to another county in the same state, and from thence to Jackson county, in Alabama. The answer of Hatfield admitted the conveyance, but denied that any condition was therewith connected, and asserted the same to have been absolute and unconditional. It set out the bill of sale, by which it appeared that there was a subscribing witness thereto, whose absence was not accounted for in the bill. The answer further averred, the allegation of an indorsement of defeasance on the back of the deed, to be false—denied any such indorsement to have been made, and accounted for some stain on the back of the conveyance, (of which profert was made) by averring it to have been caused by accident. The answer also interposed the lapse of time which had accrued between the date of the conveyance and the institution of the action, in bar of the complainant's claim.

The testimony of the agent of Hugh Montgomery, showed, that an offer to repurchase was made by him to Hatfield, which the latter rejected, alleging that the property was *absolutely* his own. No other testimony, important to the principles decided in this case, was produced, and the Court, on a hearing of the cause, rendered a decree for the complainants. The defendant below, took his writ of error to this Court, and among other assignments made, it was insisted,

1. That Montgomery, the complainant, was an incompetent witness.

2. That the subscribing witness to the conveyance should have been produced, or his absence accounted for, before the production of secondary evidence.

3. That the lapse of time, barred the action.

S, PARSONS, for Plaintiff—cited 3 *Johns. Ch. Rep.* 612—2 *Stark.* 747, 780—1 *Conn. Rep.* 147—2 *Stark.* 745, 756—2 *Bac. Abr.* 554, note a,—3 *Stark.* 1062, '63—3 *Johns. Ch. Rep.* 371, 375—3 *Johns. Cas.* 316, '18—2 *Equity Cas.* 396—10 *Mod.* 19—1 *Mad. Ch.* 257—1 *Fonb.* 331—3 *Johns. Ch. Rep.* 217—*Story on Bail* 197—8 *Johns. Rep.* 97—1 *Caine's Rep.* 199—5 *Johns. Rep.* 258—1 *Mad. Ch.* 517—*ibid.* 519, 520—2 *Scho. & Lef.* 618, 636, 629, 632, 635, 237, 238, 628, 639—1 *Cokes Rep.* 179—*Ham. Dig.* 215—6 *Johns. Rep.* 543—14 *do.* 501—2 *Bibb* 4—1 *Coke's Rep.* 9—1 *Littell* 191—2 *Marsh.* 58—1 *Johns. Ch. Rep.* 594—3 *do.* 136—1 *Marsh.* 144—2 *Johns. Ch. Rep.* 191—*Wheat. Sel.* 120, note 90—4 *Greenl.* 42—2 *Pick.* 368, 5 *Conn. Rep.* 488—1 *Powell on Mort.* 122, note n.—*Story on Bail* 235—1 *Powell on Mort.* 126—2 *Bac. Abr.* 372—20 *Johns. Rep.* 528—7 *Cranch* 237—1 *Call* 192—4 *Kent's Com.* 139.

HOPKINS, contra—3 *Marsh.* 293—2 *do.* 576—1 *Stent.*

163—*Aik. Dig.* 284—1 *Johns. Dig.* 577—2 *Johns. Rep.* 451—*English vs. Lane*, 1 *Porter's Rep.* 1st ed. 328—*Powell on Con.* 225, 226—*Story on Bail*, 235—2 *Call*, 256, 362—3 *Peere Williams*, 1st Am. ed. 358, 359—1 *Vern.* 183, 393—4 *Kent's Com.* 153, note b—1 *Vern.* 231—*Story on Bail*, 236—*Powell on Mort.* 392, note 1—4 *Kent's Com.* 126—2 *Scho. & Lef.* 630—*Powell on Mort.* 396, 401—*Story on Bail*, 235—4 *Kent's Com.* 182—9 *Wheat.* 498—1 *Mad. Chan.* 520, '1, '2, 310—*Powell on Mort.* 392, 389—15 *Johns. R.* 3—11 *Wheat.* 311—4 *Johns. Chan. R.* 293—6 *Wheat.* 481—*Angel on Lim.* 281—*Fonb. Eq.* 331—*Aik. Dig.* 281.

By Mr. Chief Justice SARGOLD:

The defendants in error, P. R. Montgomery and W. Belcher, of Tennessee, charge by bill, that in 1807 or 1809, Hugh Montgomery, father of complainant Montgomery, conveyed to Hatfield, then of Campbell county, Tennessee, a negro girl, *Malinda*, for three hundred dollars. After bargaining for said girl, at the time of making the conveyance aforesaid, said Hatfield, in consideration of three bushels of salt, of the value of five dollars per bushel, paid him by said H. Montgomery, agreed to allow him the privilege of *redeeming* or *repurchasing* said girl at any time for said three hundred dollars, and interest thereon to the time of his offering to redeem; and an indorsement, containing this agreement, on said bill of sale, was then made and signed by Hatfield—That in a reasonable time thereafter, said Hugh Montgomery, by his agent James M. Campbell, tendered to Hatfield the three hundred dollars, with interest, and demanded the negro, which was refused: that the bill of sale is in possession of Hatfield, so that complainants cannot produce the same; but they pray that Hatfield be compelled to produce it: that said con-

veyance is a mortgage, and was so considered by said Hugh, and that said Hatfield has fraudulently attempted to obliterate and deface said indorsement.

The bill further charges, that in May, 1830, said H. Montgomery assigned by instrument, here ready to be produced, all his right, title and interest in said mortgage, to complainant, Montgomery, and that by him, half thereof was assigned to Belcher; and that they would have redeemed said girl, but for the fraudulent conduct of said Hatfield: that, in or about 1817, Hatfield removed from Campbell county, Tennessee, to Marion, in the same state, where he resided until within six or nine months of the filing this bill, when he removed to an obscure part of Jackson county, in this state, with said girl and her issue, (six or eight children,) to avoid this claim; and prays a discovery of the number and names of the issue, &c.: it charges the hire to have far exceeded the three hundred dollars and interest: it prays an answer to all these allegations; that an account be taken; that the bill of sale be cancelled, and the negroes delivered up, &c.

The plaintiff in error, as defendant to the bill, by his answer, positively denies all equity alleged; admits the conveyance, but avers the sale to have been *absolute* and unconditional, according to the terms of the conveyance; he makes profert of it, and exhibits, what he avers to be a copy, such as described by him, purporting to be absolute, and without seal. He further says, the back or white side of the bill of sale, on which there was no defeasance, became defaced by the accidental falling of the paper into some dye stuff. The bill of sale thus brought to view, purports to have been attested by Abner Lozell, as a subscribing witness. The fact of its having been so attested, is not contested. The answer further avers, that this contract was executed not in 1807 or 1809, as charged,

but, in March, 1804, and the bill of sale, as exhibited, bears that date; shewing a lapse of *twenty six years* between the date of the conveyance, and the institution of this suit. The subscribing witness has not been examined, in proof of the alleged contract: his absence is in no way attempted to be accounted for; nor is any manner of excuse offered, why his depositions were not taken in proof of the alleged defeasance. The contents of the instrument, both the face and the back, are charged as parts of the same contract, simultaneously made; so that a subscribing witness to any part of the conveyance, must be regarded as such, in relation to the entire instrument.

The answer denies that any offer was ever made by Montgomery's agent, or otherwise, to redeem the property: it also denies, that the defendant ever removed for the purpose of avoiding a suit for this property; or that his removals were secret, or to any obscure place.

This brief examination of the bill and answer, is sufficient to present for consideration, a question highly important in principle, and one, which we deem decisive of this case. It is, whether, in the contract between Hatfield and Hugh Montgomery, in which the bill of sale was given, there was any valid agreement for the right to redeem or repurchase the negro girl? If we are warranted in determining there was any, we must conclude there was one substantially such as charged in the bill.

This, as well as all other facts, must depend on the weight of *competent* evidence. Then what is the amount of such evidence? The testimony of Hugh Montgomery must be rejected as that of an incompetent witness, for reasons presently to be stated.

The evidence of the other witnesses, is vague and conflicting, as respects the existence of any such de-

feasance : so that, if there were no legal objection applying to all the testimony on this point, it is questionable if it could be considered tantamount to two positive witnesses, or one and pregnant circumstances, in disproof of the defendants' absolute denial of any defeasance—a matter clearly within his knowledge, and responsive to the allegation of the bill. Nothing short of this will satisfy the rule of chancery, in this respect. But we are unavoidably led to the inquiry, whether any of the proof offered, on this point, can be regarded as evidence, while the *subscribing witness* remains unexamined ; and while no foundation has been laid for the introduction of the secondary evidence ? And is not this an additional objection to Montgomery's testimony ?

It is true, as contended in argument, that in the case of *Hall vs. Phelps*,² the Supreme Court of New-
² Johns. Rep. 461.

York recognised the competency of secondary evidence to prove the instrument, it being in the nature of a *simple* contract. But it is no less true, that in the subsequent case of *Fox vs. Reil, et al.*,³ the former decision was much shaken, even in relation to simple contracts ; and entirely repudiated, so far as it could have been supposed to apply to specialties. In the latter, the action was debt on a *bond*, to which was the plea of *non est factum*. At the trial, the plaintiff offered to prove that the bond had been shewn to the defendants a short time before the commencement of the suit, and that they then confessed they had executed it. To this bond were subscribing witnesses, who were not produced ; nor was their absence accounted for. In the consideration of the question, respecting the admissibility of the confession, after full argument, the same Court decided, that the admission of the obligors, was insufficient ; that the witness must be produced, or in case of his death, or ob-

sence from the state, his hand writing must be proved. Chief Justice *Kent*, in delivering the opinion of the Court, reviewed the doctrine at great length. He distinguished this case from that of *Hall vs. Phelps*, mainly, on the ground, that one was on a specialty, requiring greater strictness; the other, on a simple instrument, concerning which, as was supposed, the rules of evidence might more safely be relaxed than in case of deeds, which are of much higher force and solemnity in the law, and carry with them internal evidence of good consideration. The Chief Justice, though he had concurred in the former opinion, yielded the authority of any observations therein, applying the same doctrine to deeds. These observations, he said, were to be considered as having been made by way of illustration, and not as applicable to the case then before the Court, and therefore, not authority: that the Courts were certainly concluded, by an ancient and uniform rule of the common law, that, "where the defendant has not acknowledged his deed before a competent public officer, or has not expressly agreed to admit it in evidence on the trial, but has put himself upon his plea of *non est factum*, the plaintiff must produce the subscribing witness, and give the defendant the benefit of an investigation of the circumstances attending the execution of the deed." He shewed, that though the early English law, requiring that the best men in the neighborhood should be registered in the body of the deed, as witnesses of the execution, and that they should form a necessary part of the jury, to try its validity, when denied, had been relaxed; yet, that the Courts were bound by the well established rule before referred to, that an admission or acknowledgment, to supersede the necessity of producing the subscribing witness, must be made before a competent public officer, or there must

have been an agreement to admit the evidence upon the trial. He further said, he had met with no case where the absence of the subscribing witness was not accounted for, in which the Courts have allowed in evidence any species of confession by the party, which was inferior in its nature, and less solemn in its form, than as above prescribed. Various other authorities, sustain the applicability of the same rule, to all written instruments which are attested.—*Vide, doe ex dem.*

* 2 Maul. & Selwin 62, note b.
 † Johns. Rep. 481—Phil. Ev. 357.

*Sykes vs. Durnford.**

The case last reviewed, and those referred to, I think, establish the principle conclusively, that if the rule can be relaxed, (of which I express no opinion,) it can only be in cases of negotiable securities, for the benefit of commerce. The defeasance in question, if one ever existed, being like the body of the instrument, in the nature of a conveyance of property, must require the same grade of proof, whether the instrument be indorsed or not. Had the entire contract, or the defeasance alone been by parol, then this rule of evidence, (as in the case of *English vs. Lane*,^b of the present term,) could have had no application to the case, because it could not have appeared that the parties had in the more solemn manner, agreed to rest the entire contract on written evidence, and to rely on the particular knowledge, or general intelligence and veracity of a designated individual, to prove the agreement.

^b 1 Porter's R. 328, 1st ed.

^c 1 Stew. 174.

In the case of *Rinaldi vs. Rives*,^c it was held that where there is written evidence in the power of the party to procure, parol evidence of the confession or admission of the adverse party, respecting the existence and contents of the instrument, is inadmissible as evidence; that the latter is an inferior grade of testimony. The analagous principle follows, that if an attested instrument has been lost or destroyed, the

party claiming the benefit of it must establish the contents by the subscribing witness, if his evidence can be procured, if not, he must remove the suspicion which otherwise arises from its absence, by laying the usual foundation for secondary proof. The late decision of this Court, in the case of *Robinson's adm'r vs. Burnett*, maintains the same principle, shews the sacred character of this description of evidence, and that it cannot be dispensed with, when practicable to be obtained; and that the purely voluntary act of the adversary, cannot deprive a party of the benefit of it.

The same principle is strongly maintained, especially in reference to deeds and other instruments intended to have the same effect, by *Starkie in his Treatise on Evidence*.^{1st v. 331, 332} He says "If the deed or instrument produced purport to have been attested by one or more witnesses, whose names are subscribed, the party must call at least one of the witnesses; and in cases where the instrument labors under any doubt or suspicion, he ought to call them all: that the law requires the testimony of the subscribing witness, because the parties, by selecting him as the witness, have mutually agreed to rest upon his testimony in proof of the execution of the instrument, and of the circumstances which took place; because he knows those facts which are probably unknown to others. "So rigid," says he, "is this rule, that it is not superseded in the case of a deed, by any admission or acknowledgment of the execution by the party himself, whether the action be brought against the obligor himself, or against his assignees after his bankruptcy, nor by any admission of the execution made by the defendant in his answer to a bill in equity," in a different suit:—That, "the rule applies, whether the question be between the parties to the deed, or strangers; whether the deed be the foundation of the action, or but col-

*See his numerous authorities here referred to.

lateral, or whether it still exists or has been cancelled; and though the issue be directed by a Court of Equity, to try the date, not the existence of the deed.*

† 2 Wendell, 575.

The recent adjudication, in *Henry & Emott vs. Bishop*,† is as strong a case as can be imagined to test the principle. The action was *covenant*. One whose name appeared as a subscribing witness to the covenant, (which also contained the names of two other subscribing witnesses,) was introduced to prove the execution. He testified that he saw the two other witnesses subscribe it; that he executed it as attorney for the plaintiff; and that the instrument ever since its date had been in his possession; and that after the period for the performance, the defendant stated to him his inability to comply with the contract, and requested that the plaintiff would release him. But this witness farther stated, that he did not subscribe his name as a witness at the execution of the instrument, but that he had done so since the trial had been called on. The Supreme Court there held, that, as it did not appear but that the *subscribing witness* might have been produced, and the witness offered could not be viewed as such, not having attested the instrument at the time of its execution, his evidence could not be received. In that case, it will be noticed, there could have been no difficulty respecting the *identity* of the instrument; yet the testimony was rejected, because the witness offered was not one of those *selected by the parties*, to make the proof and explain the circumstances. It is also worthy of remark, that this latter decision was by the same Court, and twenty years later than in *Hall vs. Phelps*, which has been referred to as an authority on the part of the defendant in error.

On the particular point, of Montgomery's general competency as a witness for these complainants, the

case of *Roberts vs. Anderson*,^a is a strong authority against it. There the principle was ruled, that one who is charged to have fraudulently acquired title to land, and fraudulently conveyed it, though by a mere *quit claim* deed, without covenants, is incompetent as a witness for his grantee, in a suit brought against him by a person claiming it as a *bona fide* purchaser. Here, the question of fraud by Montgomery, as well as by Hatfield, was in issue; and it does not even appear that Montgomery's was only a *quit claim* conveyance to the complainants—consequently, on this ground also, he was incompetent to prove the deed. But if these objections to the competency and certainty of the complainants' evidence could be overcome, when the great lapse of time is considered, I should be constrained to say, the circumstances do not establish the right of redemption, as in case of a mortgage. In *Conway's ex. vs. Alexander*,^b Chief Justice Marshall, in ^{7 Cranch 218} delivering the opinion of the Court, illustrates this subject very satisfactorily. He maintains the unquestionable right of all persons laboring under no legal disability, to stipulate contracts either in the nature of mortgages, or conditional sales, and sustains the validity of either, according to such stipulations, and the true intent of the parties. The contrary principle, he says, would transfer to the Court of Chancery, the guardianship of adults, as well as of infants; and to sustain a sale with a reservation to the vendor of the right to repurchase the same property at a fixed price, and at a specified time, does not conflict with either the letter or the policy of the law. But, that the policy of the law does prohibit the conversion of a real mortgage into a sale, is clearly conceded: and in doubtful cases, the leaning of all the Courts has been against conditional sales, and in favor of mortgages, as the only effectual means of protecting borrowers of money.

^a3 Johns. Ch'y
R.p. 371.

In the same case, it is said, that, as conditional sales, if really intended, are valid, the inquiry in every such case must be, whether the contract in the specific case was intended as a security for the repayment of money or an actual sale; that the form of the deed in questions of this nature, is not conclusive either way—that “the want of a covenant to repay the money is not complete evidence, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure.” The Chief Justice also remarked, that the adequacy of the price is a highly important consideration in determining whether a contract was intended as a mortgage or conditional sale.—(See also, *Chapman's adm'r vs. Turner.*)¹

¹ Call's Rep.
244.

In the case before us, it appears that the girl was only about nine years of age, and there is not a *scintilla* of proof that the three hundred dollars paid, was not the full value of the slave; the answer avers it to have been considerably more. Let it also be remembered, that the bill does not simply charge a contract of mortgage; the allegation is, that Hatfield agreed to allow Montgomery the privilege of redeeming or *repurchasing* said girl. Then, if without proof, the truth of the allegation be admitted, surely it could not be contended, that an agreement to repurchase at a subsequent undefined period, but in contemplation doubtless, of only a few years, could entitle the party or his assignee to this privilege, after the lapse of twenty or thirty years. If the evidence clearly disclosed the true intention of the contract, the reasonableness of it could have little or no influence on our deliberations. Our province would only be, to enforce the contract according to the agreement; or if the intention was incompatible with the law, to en-

force the contract according to its legal effect, if any it had. But here, the intention not being thus manifest, it is proper we should consider the motives which could have induced the contract. Then, can any rational motive be imagined, why Hatfield should have taken a slave *nine years of age*; have advanced an amount of money equal to her *full value*, if not more; made himself responsible for her hire when of any use, and at any rate responsible for a restoration of the girl, with her increase, if any, at the expiration of the twenty six years that have elapsed, or even one fourth of that time, on the re-payment of the three hundred dollars, and interest thereon. The probability of such a contract, is farther excluded by the fact, that no security was taken for the money, when Montgomery's circumstances appear to have been very doubtful; even his personal responsibility does not appear to have been contracted. Had the slave died, the loss must have been Hatfield's; if to live and increase, such a contract, in the time that has elapsed, must deprive him of all the negroes, and thereby affect his interest to the amount of about sixteen hundred dollars, when an absolute purchase of the same slave, or another of the like description, would have secured all without the least responsibility. Before we can conclude that a valid contract of this kind exists, we should require clear and satisfactory evidence of it; and that the complainants had strictly entitled themselves to this advantage. But, as has already been shewn, the complainants, after this long term of time, have not produced to the Court the best evidence the case admits of, or given any excuse for not doing so. Another consideration weighing strongly against the probability that a mortgage was intended, is the further fact, alleged by the complainants themselves, that Montgomery, while deli-

vering up to Hatfield the possession of the negro, with an absolute bill of sale for the same, should not, have taken into his own keeping a separate defeasance, instead of relying, as he says he did, on an indorsement on the conveyance, to be kept by Hatfield.

The argument of counsel, has involved in this case another question, which, under different circumstances, would require grave consideration. It is, whether the lapse of time between the execution of this contract, and the institution of the suit (being twenty six years) operates as a bar to the relief sought? and if it would, in the absence of any subsequent acknowledgment on the part of Hatfield, have the complainants established sufficient acknowledgments to avoid this bar? Was it not further necessary, that they should have disclosed in their bill any circumstances which could excuse the delay?

After the views already taken of the case, in other respects, I will content myself with a brief notice of these questions. It must be borne in mind, that the defendant, by his answer, as by statute he might, has demurred to the relief sought; and also pleaded in bar the limitation of time, and that the demand is stale.

The counsel for the complainants contend, that, to relief against fraud, as here charged, there is no limitation; and that this is a mortgage of that description, which allows to complainants the period of the mortgagors' life-time to redeem in. I concede, that in equity a mortgage is regarded as a mere security for a debt; that while it continues a subsisting mortgage, and until foreclosure, the mortgagor continues the real owner of the mortgaged property; and that in a court of law, except as to the mortgagee, the principle is the same: also, that as a general rule, that which is once a mortgage, continues such until the

object be effected. This doctrine is declared more particularly in reference to real estate, but as a general rule, I consider it also applicable to personal property. It does not, however, follow, that if fraud has been practised, the adverse party has unlimited time for the prosecution of his rights, *after his knowledge* of the existence of those rights, and of the fraud committed ; or, that in case of a mortgage, more than any other deeds, that the law will not presume payment or a discharge of the equity, after an unreasonable lapse of time.

An authority, on which both parties appear willing to rely, in reference to this point, is *Maddock's Chancery*. There it is said, that the statute of limitations ^{*1st vol. 256.} cannot be pleaded to a bill for the *discovery merely of fraud*, length of time forming no bar. That, "no length of time," as Lord *Erskine* more than once emphatically observed, "can prevent the unkennelling of fraud." Lord *Nottingham* also remarked, that, "*no delay could purge a fraud* ; that every delay arising from it, adds to its injustice, and multiplies the oppression." *Maddock*, however, in immediate connection with the above quotations of these distinguished Chancellors, and on their authority and that of others, continues, by saying, "Where the fraud was committed a considerable time back, the bill ought to state, *that it was discovered within six years* before the bill was filed ; or a waiver of the objection as to length of time should appear on the face of the proceedings ; length of time always forming a strong objection, where it can be used to shew *acquiescence*, but in no other way : that "though persons are embarrassed, and reduced by the fraud of others, yet the Courts cannot act upon such circumstances, for then there would be an end of all limitations of actions in the case of distressed persons ; for if relief might be giv-

en after *twenty years*, on the ground of such distress, it may after thirty, forty, or fifty years.

2 Scho. & Lef.
607.

In the case of *Hovenden vs. Lord Annesley*,* the subject of fraud and of limitations in chancery is examined at great length; and the principle is maintained, that even in cases of fraud, the right must be prosecuted in a reasonable time after the discovery of the facts constituting fraud. The *Lord Chancellor* remarks, that the question as to the simple effect of the lapse of time, is very material: he quotes, with approbation, the old maxim of the law, *Vigilantibus non dormientibus servit lex*. Again, he remarks, that it is said Courts of Equity are not within the statute of limitations: this is admitted in one respect: "they are not within the words of the statute, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered." I think it a mistake, in point of language, to say that Courts of Equity act merely by analogy to the statutes: they act in obedience to them. The statute of limitations, applying relief to certain legal remedies—for recovering the possession of lands, for recovering of debts, &c.: Equity, which in all cases follows the law, acts on legal titles, and legal demands, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies; nevertheless, in thus administering according to the means afforded by a Court of Equity, it follows the law.

3 Cook's Rep.
179.

The case of *Shelby's heirs vs. Shelby's heirs*,^b maintains fully the principle, that the statute of limitations will be a bar to any relief sought in Equity, if it be a case where relief could have been given at law; also, that it will run against fraud. In respect to fraud, this exception is admitted, "that where it has been secretly practised, the statute will not be a bar;

but it is necessary in such case, to aver in the bill, that the fraud was not discovered within three years before the institution of the suit; and the complainant must shew, at least from circumstances, that he could not well be supposed to have known that he was defrauded at an early period; otherwise this part of the bill will be considered unsupported." An authority,* particularly relied on by the complainant's counsel, on this point, has reference to a case where a mortgage on land had lain dormant twenty years, and it was considered that the lapse of time was sufficient to afford a presumption of payment; but that this period was only a circumstance on which to found a presumption, and not in itself a bar. In that case, it was held, that the report of the state officers, by order of the Senate, on the petition of the occupants of the premises, that the mortgage was outstanding, and which also ascertained the balance due on the mortgage, was sufficient to repel the presumption of payment; especially when connected with the circumstance, that the premises remained uncultivated, and a forest until within six or eight years of the time when the claim was asserted.—Vide *Jackson vs. Pierce*.^b In that case it is shewn, that the agents of the state had formally and solemnly acknowledged the existence of the mortgage, and the balance due upon it. The subject of that litigation was real estate, when of this it is personal; and in this, the lapse of time exceeded that (after deducting for the revolutionary war,) not less than five or six years. In this case also, if all the evidence taken, could be regarded as competent, it would fall short of the other, in respect to the nature and extent of the acknowledgments. The same author, on the same page, cites other adjudged principles, which have a more direct application to the case before us: thus, where there has been

* 1 Powell on Mort. 39; a. note 1.

^b 10 Johns. Re. 414.

no foreclosure, nor entry on the land by the mortgagor, nor interest paid within twenty years, the mortgage is not regarded as a subsisting title.* Again—a possession of the mortgagee of a slave for twenty-two years, unaccompanied with any act or acknowledgment, recognizing a mortgage, is a bar to the equity of redemption.^b He further says, that in determining whether the equity of redemption is gone, the time is to be computed from the last period at which the parties treated the transaction as a mortgage.^c

*7 Johns. Rep.
283—3 id. 386

^b1 Hawks, 17.

^c1 Murph. 218.

*1 Johns. Ch.
Rep. 594.

In *Marks vs. Pell*,^d a bill was filed for an account, and for a re-conveyance thirty years after the deed alleged to have been a mortgage was given, during all which time the defendant had been in possession. It was there held, (the subject being real estate,) that parol evidence of the mere confessions of the defendant, made seventeen years after the deed, that it was taken as a security for a debt, was insufficient to entitle the plaintiff to relief; that the claim had become too stale to be thus revived.

*7 Johns. Ch.
Rep. 90.

In *Kane vs. Bloodgood*,^e this subject was very elaborately investigated. The controversy related to bank stock. *The Chancellor* decreed that the statute of limitations was a good plea in equity, as well as at law: that those trusts which are mere creatures of a court of equity, and not within the cognizance of a court of law, are not within the statute of limitations; that so long as there is a continuing and subsisting trust, acknowledged and acted on by the parties, the statute does not apply: but that, if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes *adverse, lapse of time from that period*, may constitute a bar in equity: and that other trusts, which are the ground of an action at law, are not exempt from the operation of the statute.

The Supreme Court of the United States, in *Bell*

vs. *Morrison, et al.*,^a pronounces the statute of limitations to be a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time ; but to afford security against *stale demands*, after the true state of the transaction may have been forgotten, or become incapable of explanation, by reason of the death or removal of witnesses ; that, therefore, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it should have received such support from the courts of justice, as would have made it what it was intended emphatically to be, a *statute of repose*. The principle was there also recognised, that if the bar of the statute is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and to be in terms unequivocal and determinate ; and if any conditions are annexed, they ought to be shewn to have been performed.

Now, consistently with the established principles of law, which have been reviewed, and which are considered more than sufficient on the present occasion, it is impossible the complainants can obtain the relief sought upon what appear to be the facts of the case.

After what has been said, it is unnecessary to notice more particularly any of the complainants' evidence, except that of the witness Campbell, who is regarded as highly reputable, and whose testimony relating to the alleged tender of the money, is free from all the objections stated in relation to the other proofs relied upon. It is in substance, that between seventeen and twenty years prior to the institution of this suit, he, as attorney of H. Montgomery, demanded the negro in question, with her increase ; he is under the impression that he told Hatfield he had the

amount of money which had been advanced ; he does not recollect telling him he would pay the amount of money due, and interest, but that he said to him he was authorised to pay *whatever* might be due on settlement, and would have done so on settlement and delivery of the negroes; but that Hatfield refused to receive the money, saying the negroes were not in his possession ; also stating that he had *a good title to them*. The effect of this evidence, whether proof of a legal tender or not, (and concerning which I do not stop to inquire,) is unequivocal and conclusive proof that Hatfield, at that time disavowed the existence of any mortgage or other trust, and openly professed to hold *adversely* to the claim now attempted to be established.

Thus it appears, that after the lapse of six or eight years from the contract, Hatfield denied to Montgomery's agent, which implies full knowledge to the principal, the existence of any defeasance, or any right of redemption ; that then there was a farther lapse of say eighteen years, during which this claim was suffered to lie dormant; while Hatfield continued in the peaceable enjoyment of the property. What period short of that which has intervened in this case, would be considered sufficient to bar a claim of this description, is a question of intrinsic difficulty ; therefore, no definite opinion is expressed upon it. But we have no hesitation in saying, a period far short of that which has occurred, is amply sufficient; and that it would be so after deducting all the time that could be claimed in consequence of Hatfield's removals, as charged ; if such deduction be, on principle allowable.

Then, on this ground, and the absence of competent proof that a defeasance ever existed, we are of opinion the decree of the Court below must be reversed, and the complainants bill dismissed.

HORTON versus RONALDS.

A and B bound themselves by a *sealed agreement* to abide the award of certain others chosen by themselves, in a controversy between them; and that whatever amount was found against either should be paid in *debts due to the party found debtor*.—Held,

That where A on the balance found against B commenced an original attachment, and obtained judgment by default, without a jury, as in *indebitatus assumpsit*, for the amount in *money*, such judgment was erroneous, and that A had not resorted to the proper action.

This action was commenced, by attachment, against Ronalds, in the County Court of Limestone. The plaintiff declared as in *indebitatus assumpsit*, on an agreement *under seal*, to abide the award of certain persons. The agreement stipulated, that whatever amount should be found due against either of the parties, should be paid in debts due, to the party found indebted, in the State of Alabama. An award was made, and a balance found against the defendant, Ronalds. To recover this balance, an attachment was levied and returned to the County Court; and thereon a judgment was rendered against the defendant, by default, for the balance in money, and interest from the date of the award. A writ of error having been taken to the Circuit Court, the judgment was reversed. The case was then brought into the Supreme Court, and the proceedings of the Circuit Court assigned as erroneous.

HOPKINS, for Plaintiff.—*Aik. Dig.* 41, § 15—*ibid.* 269—*Ala. Rep* 18—2 *Chitty's Black.* 100.

By Mr. Justice THORNTON:

This cause was commenced by original attachment, against the defendant in error, who was a non-

resident—returnable to the County Court of Limestone county. In that Court a declaration was filed in the form of *indebitatus assumpsit*; setting forth an agreement, under seal, of the parties; whereby they bound themselves to submit certain matters of controversy between them, to the award and arbitration of two designated persons; who were authorised, in case of disagreement, to select an umpire, any two of whom were authorised to decide; which said agreement contains the further covenant, that whatever amount should be found by the said award, as due from the one to the other, should be paid, not in money, but in debts due to the said party thus ascertained to be the debtor, in Alabama. The declaration also sets forth the award made in pursuance of this covenant, whereby it appears, that the sum of seven hundred and sixty eight dollars, eighty and a half cents, were adjudged as due and payable from the said defendant in error, to the plaintiff. The declaration avers the *super se assumpsit*, in the common form, and concludes with the breach of non-payment of the said sum of money. A judgment was had by default, in the County Court, and rendered without the intervention of a jury, for the said sum of money, with interest thereon from the date of the award. A writ of error was taken to the Circuit Court of Limestone; and, upon various errors assigned, the judgment of the County Court was reversed: from which, the writ of error was taken to this Court.

The assignment of error now made, brings to our view, the correctness of that reversal by the Circuit Court. We have no means of ascertaining, upon which of the various grounds alleged, in the assignment of error below, that Court determined. There is one, however, which, as we think, covers a substantial defect, and sustains the judgment of that Court;

which being decisive of the controversy as now presented, will only be determined by us. Considering the award as made in pursuance of the agreement, and to be an ascertainment of the amount due, the liability of the plaintiff in error, then arises, under his covenant, to discharge that amount, not in money, but in debts due to him from other persons in Alabama. This being the true nature of the obligation, which is contained in the solemn deed of the parties, there is no warrant in law for attempting to enforce a different liability, and by a form of action not appropriate to the nature of the contract.

Let the judgment of the Circuit Court, reversing that of the County Court, be affirmed.

CARTER, et al. *versus* CREWS.

Where the record of a judgment rendered in another state, was in the following words, "for the sum of two hundred and twenty dollars debt, which may be discharged by the payment of one hundred and ten dollars," &c.—Held,

1st. That debt was a proper action for the recovery of the claim.

2d. That in an action to recover the amount due on the judgment, it was not error to declare for the conditional sum of one hundred and ten dollars.

IN this case, the plaintiff below, brought his action of debt against the defendants, in the County Court of Franklin, to recover the amount due on a judgment rendered in the State of Virginia. The entry of judgment in the Virginia Court, was, for the sum of two hundred and twenty dollars debt, to be discharged by the payment of one hundred and ten dollars, &c. The plaintiff declared for the sum of one hundred and ten dollars, and to his declaration a demurrer was filed. The County Court overruled the

demurrer, and rendered judgment for the plaintiff. A writ of error was then taken to the Circuit Court, and the judgment affirmed; whereupon, the plaintiffs in error brought the cause to this Court, and assigned as cause for its reversal, that the action should have been brought for the sum of two hundred and twenty dollars, and not for the lesser sum.

PECK, for Plaintiff.—4 *Munf.* 307—1 *Stewt.* 152.

P. MARTIN, *contra*

By Mr. Justice THORNTON:

This was an action of debt, brought by the defendant in error, against the plaintiffs, in the County Court of Franklin—where, upon a demurrer filed to the declaration, a judgment was rendered for the said defendant; from which, the plaintiffs took a writ of error to the Circuit Court of said county—assigning for error the judgment aforesaid, which was affirmed: and now, in this Court, the judgment of the Circuit Court, in the premises, is also assigned for error.

The action was brought upon a record of a judgment rendered against the plaintiffs, in the State of Virginia, on the twentieth of June, 1827, in this form: “for the sum of two hundred and twenty dollars debt, which may be discharged by the payment of one hundred and ten dollars, with legal interest thereon from the 25th day of December, 1821, till paid.” The declaration demands, as the sum due and detained, the said sum of one hundred and ten dollars, and the costs of suit, amounting to one hundred and seventeen dollars and sixty five cents. The demurrer, it is contended, should have been sustained, for not demanding the sum of two hundred and twenty dollars, by the declaration. If it be a correct principle in pleading, that the writing sued on, whether it be

a specialty, simple contract, or record, may be declared on according to its legal effect, I see no satisfactory reason why the declaration in this case, should not be maintained.

If suit were brought upon a penal bond, by the common law, the penal sum must not only have been demanded, but that amount was recoverable. The manifest injustice, however, of this result, was obviated by the intervention of chancery, which always relieved against the penalty, and restrained the recovery to the sum in the condition, which was equitably due. This necessary resort to chancery, however, being expensive and dilatory, by statutes in England, of 8th and 9th *William III*, which I believe have been adopted, or enacted, in every state in the Union, the judgment was required to be entered at once, in the common law courts, for the conditional sum; and perhaps the most technical mode of doing this, is, that which seems to be adopted in Virginia; that is, to enter the judgment for the penalty, which may be discharged by the lesser amount; which last, alone, can be levied by execution. Is it not apparent then, that the amount actually due by the judgment, is in effect, and in truth, that lesser sum? If the judgment were rendered, as I believe judgments are in this state, under the same statute, there could be no ground even for cavil. We have been referred to a decision in 4 *Munf*. 307, from whence it appears, that the very defect, here sought to be availed by the demurrer, was held fatal in Virginia, even though not demurred to, in the inferior Court. The only reason which is given for the decision in that case, is, that by the mode of declaring, the defendant in the action might be, in event, subjected to the recovery of a greater amount, than that mentioned in the first part of the judgment, which is to be discharged by the smaller sum named therein.

If, however, the judgment, itself, by its own terms, subjects him to this predicament, and not the mere mode of declaring on it, then if that be unjust, the original judgment should be attacked, as erroneous, and not the declaration, which seeks only to obtain its benefit, as it stands. Suppose no action were brought on this Virginia judgment, but that, after seventeen years, an execution were to issue upon it? If the ministerial officer obeyed the mandate of the execution, would he not levy more than the amount named in the former part of the judgment? The judgment then, to be perfect in itself, according to this view, should contain a restriction, which would prevent the recovery of interest, beyond what, added to the principal, would be equal to the first named sum.

I do not think, however, that the analogy holds between a judgment of this character, and a penal bond, and the argument drawn from it, to my mind, is fallacious. Admit that a judgment upon a penal bond, can in no event, be greater than the penalty, yet, when the bond is carried into judgment, which, by the statute, is to be for the amount actually due, there is, in contemplation of law, no longer any penalty. There is but one single sum in truth, which is due. If it is illegal, that in any event, more should be realised from a judgment on a penal bond, than the penalty, the judgment itself should guard against that result: but so long as the judgment pursues the form of the one sued on, and runs for the conditional amount, with interest, until paid, more than the penalty may eventually be levied, by delaying the execution. Now, if a greater amount becomes due, and a necessity arises, to sue upon the judgment, why not allow a recovery by action, to the extent really due, according to the terms of the judgment, and which, by execution, could be levied upon it. If, however, it were

illegal to recover more on a judgment of this sort, than the amount first named in it, this matter could as well be regulated when the action is brought, for the lesser amount, as where, in an action on a penal bond, from the length of time, the interest added to the condition, exceeds the penalty.

As I would sue on a penal bond for the amount promised to be paid, and not the condition, which, by the statute, shall be the sum to be recovered, so, in suing on a judgment, I would demand, without apprehension of error, the amount actually due by it; whether the form were *a nomine pena*, or a direct award of that amount, without mention made of any other. I think either mode of declaring on this judgment, would be substantially good; as either mode of entering the judgment itself, would have been equally valid. There is no misconception of the remedy here—the action is properly debt. The mode of demanding, is at most, but a formal defect, and so, not available on general demurrer, which is the only kind now tolerated by our statute.

Let the judgment be affirmed.

MEAD *versus* DANIEL, et al.

The complaint of a party, in a proceeding before a justice for Forcible entry and Detainer, need not specify the land by statutory demarkations of section, township, and range: any description by metes and bounds, and objects of notoriety in the neighborhood, is sufficient.

In such proceeding, the law does not require the Justice to record and certify all the evidence before him. It is only necessary to record and certify such as is admitted after objection, or rejected when offered.

An unexpired term of years, is a sufficient estate to support this proceeding.

THIS was an action before a Justice of the Peace in Blount county, for forcible entry and detainer.— On the trial before the Justice, a judgment was rendered in favor of the plaintiff in error. The defendants having taken the case to the Circuit Court by *certiorari*, assigned, among other causes—

1st. That the complaint did not specify the land with sufficient certainty, nor the estate of the plaintiff therein.

2d. That sufficient evidence was not recorded.

The Circuit Court reversed the judgment of the Justice, and the plaintiff took his writ of error to this Court.

By Mr. Justice THORNTON.

This was a proceeding had before a Justice of the Peace, instituted upon the complaint of the plaintiff in error, for a forcible entry and detainer, by the defendants. The proceedings were brought into the Circuit Court of Blount county, according to the statute regulating such case, by writ of *certiorari*, where various errors were assigned, upon which, the judgment of the Justice was reversed. From this judgment of the Circuit Court, a writ of error has been taken to this Court. The assignment of errors here,

involves the same matters, which were adjudged below. Of these various grounds, which are six in number, all of them except two, are errors of fact, of the existence of which, the record not only presents no evidence, but on the contrary, is contradictory of them.

It is needless to use any argument to shew, that the remedy for such errors as those, cannot be available in a proceeding, where the record alone is the matter to be tried; and that too, by itself—not by extraneous matter of proof, resting in parol.

The fifth and sixth errors, relate to the record as it exists; and as to the former, viz. that the complaint does not sufficiently specify the land, nor the estate of the claimant therein, we think both of those requisites of the law are substantially complied with. The estate is alleged to be an unexpired term of years; and the land, though not described by the statutory demarkations of range, township, and section, is delineated by metes and bounds, calling for natural objects of notoriety in the vicinage.

As to the latter of the two errors above mentioned, as referring to the record returned, which is, that there is no evidence recorded to support the verdict of the jury, the law does not require the Justice to record and certify all the evidence, nor any of it indeed, except such as was admitted after objection, or rejected when offered.

We think that there was error in the reversal of the judgment of the Justice of the Peace, and that the judgment of the Circuit Court be therefore reversed; the judgment of the Justice affirmed; and that the same be certified to the Circuit Court, that a *procedendo* may issue to the Justice.

SWITZER *versus* GUARDIANS OF HOLLOWAY.

If, in a suit by guardians, it is omitted in the declaration to make profert of the letters of guardianship, such defect is cured by a verdict.

The omission to make profert of letters of guardianship, can only be taken advantage of by demurrer.

Holloway, by guardians, brought an action of *detinue* against the plaintiff in error, in the Circuit Court of Marion, for the recovery of a negro slave. The declaration contained no profert of letters of guardianship, and under the plea of *non detinet*, a verdict was rendered for the defendants in error.

Switzer having taken a writ of error to this Court, assigned for cause of reversal,

1st. That there was no sufficient issue.

2d. That the declaration contained no profert of letters.

P. MARTIN, for Plaintiff—CRABB, *contra*.

By Mr. Justice HITCHCOCK :

This is an action of *detinue*, brought by the defendant in this Court, by his guardians, for a negro.—The declaration is in the common form ; but no profert is made of the letters of guardianship. The defendant below, pleaded,

1. "*Non detinet*"—to which there was issue.

2. "Purchased of Billy Holloway,"—to which there is a replication, that the vendor was of unsound mind, and incapable of contracting away his property ; and that guardians had been appointed, and that they governed him and his effects. To this there is a general replication in short, and issue, and a verdict was had for the plaintiffs, for four hundred and fifty dollars.

The assignments are,

1. That there were no such issues formed as would enable the jury to try the cause; and,
2. That the declaration is insufficient; there being no profert of the letters of guardianship.

The pleadings were, by consent, taken in short. The first plea of *non detinet*, is a proper and issuable plea, and will sustain the verdict; and the want of the profert of letters of guardianship, is cured by the verdict. It could only be taken advantage of by demurrer.*

*1 Chitty's Pl.
402.

The judgment must be affirmed.

CALLISON *versus* LITTLE.

Where there is a joint interest existing in a contract, and one of the parties dies, before action is commenced, such action must be brought in the name of the survivor; and a failure to set out in the declaration the contract, *as it existed*, and to shew the interest of the plaintiff *to be as survivor*, is error.

This was an action of assumpsit, instituted in the Circuit Court of Blount, by Little against Callison. The declaration showed the cause of action, to have been a reward offered by Callison for the arrest of one Brazille, who was charged with murder. On the trial, it was admitted by the plaintiff below, that one Queen, who was deceased, had had an equal interest in the reward, but no statement of this fact was disclosed in the declaration. The Court below instructed the jury, that if they believed Queen was dead, Little had brought the action properly. The jury rendered a verdict for the plaintiff, and the defendant having excepted to the above charge, took his writ of error to this Court.

HOPKINS, for Plaintiff—cited *Chitty's Pl.* 300—1 *Johns. Rep.* 34—1 *Saund.* 191, note 1.

McCLUNG, *contra*.

By Mr. Justice HITCHCOCK :

William Little brought an action of *assumpsit*, against John G. Callison, in the Circuit Court of Blount county, to recover the sum of one hundred dollars, it being the amount of a reward previously offered by said Callison, for the arrest of one William Brazille, who was charged in the advertisement with the crime of murder.

There are three counts in the declaration, in each of which, the plaintiff avers that he had arrested Brazille, at the request of Callison. Upon the trial, it was proved that Brazille was arrested by a constable, under a warrant from a justice of the peace, in a house in which Little was at the time of the arrest—that Little gave no aid in making the arrest—and the constable thought he was present for the purpose of assisting Brazille to make his escape. It was proved, that after the arrest was made, Little and one Queen, jointly claimed the reward, and each admitted their claim to it was equal and joint. Queen was also present at the time of the arrest. Brazille employed a lawyer, after the arrest, to defend him, and made his note, with Little as one of his securities, for the fee. Little also agreed with the lawyer, that if the reward could be recovered, it should be applied as partial payment of the note. It was admitted by Little on the trial, that if Queen were alive, he would have an equal and joint claim to the reward. There was proof of a common report, that Queen was dead. It does not appear from the declaration that Queen was to have had any part of the reward, and no men-

tion of him is made in the declaration ; but the whole reward is claimed by Little on his own account.

Several instructions were asked of the Court, which were refused : only one of which will be noticed—which is, that the Court was requested to instruct the jury, that if they believed from the evidence, that Queen, if alive, and Little, were jointly entitled to the reward, that Little was not entitled to recover. The Court refused this instruction, but instructed the jury, that if they believed Queen was dead, Little had brought the action properly.

There is no principle better settled in law, than that actions upon contracts, either express or implied, must be brought in the name of the party in whom the legal interest in such contract is vested ; and that where there is a joint interest, and one of the parties dies before suit is brought, the action must be in the name of the survivor—setting out the contract as it existed, and shewing the interest of the plaintiff to be as survivor ; and that the omission to state the case as it existed, may be taken advantage of, either by plea in abatement, or on the trial, for the variance between the declaration and the proof.*

*1 Chitty, 4

In this case, it being admitted by the plaintiff below, that Queen was a joint owner of the debt, if it existed, the Court clearly erred in refusing the instruction asked for, and in giving the instruction it did.

The judgment must therefore be reversed.

ALDRIDGE *versus* WARNER'S EXECUTORS.

A and W entered into a covenant, whereby A, after acknowledging himself indebted to W, assigned to him certain bonds. One T also signed the covenant, (as attorney for W) which was drawn to answer as a receipt from T, and also as an assignment of the bonds. In an action by W's executors upon the covenant—Held,

- 1st. That the *negligence* of W in collecting the assigned bonds, was not in issue under the plea of "*covenant performed*."
- 2d. That T. was a competent witness to shew the result of his efforts to collect the bonds.

Warner's executors commenced their action of *covenant*, in the Circuit Court of Franklin, against the plaintiff in error. The cause of action, was an agreement, signed by the parties, and one Thompson, which was framed to answer the purpose of an assignment by the firm of Aldridge, Myers & Pendleton, to Warner, of certain bonds, and as a receipt by Thompson, as an attorney, for their collection. The agreement set out an acknowledgment of debt due by Aldridge to Warner, and to secure which the bonds were assigned. It also contained a covenant on the part of Aldridge, to make good any deficiency of the bonds in discharge of the debt. The declaration averred a deficiency to meet the claim, by reason of the insolvency of a portion of the makers of the bonds assigned, and alledged a balance due, of which the defendant had received notice. To the action the defendant plead, "*covenant performed*;" to which there was replication and issue. The defendant below, as appeared by the bill of exceptions, moved the Court to instruct the jury, that before the plaintiffs could recover the amount of the deficiency, (if on account of the insolvency of the obligors of the assigned bonds,) an offer to return those bonds, or an offer to transfer the judgments recovered on them, should

have been made : Also, that before the plaintiffs could recover, they were compelled to produce evidence, that within a reasonable time after the assignment of the bonds, application had been made to the obligors for payment, and that notice was given to the defendant of their non-payment. The Court refused to give the instructions asked, and there was a judgment for the plaintiffs below. It also appeared that Thompson had been admitted as a witness, to prove the result of his efforts in collecting the bonds.

It was assigned for error here, that the Court erred,

1st. In overruling the instructions asked.

2d. In admitting the testimony of Thompson.

PECK, for Plaintiff.—The assignment of the bonds under the agreement, was made in 1820, and the action was not brought till 1832.

The negligence in this case, is such, as ought to have released the defendant below from all liability.

It is not sufficient to show, by mere proof, that the obligors of any of the assigned bonds not sued, were insolvent.

Solvency could only be legally tested by suit, and it is only in that way, that sufficient diligence could have been used.

Again—the party surely was not privileged to recover on the original debt against the assignor, while he held subsisting judgments against the obligors of the assigned bonds.

The plea, indeed, was “covenant performed ;” but if diligence and notice were necessary to render the defendant liable, then the same must be established, or the covenant remains unbroken. The true construction of the covenant is the same with the obligation, which the law raises on the assignment of a note.

As to Thompson's testimony: if the instrument be a covenant, he was certainly a covenantor, and he could not therefore be a legal witness.—9 *Johns. Rep.* 121—1 *ib.* 34—*Stocking vs. Conway's ex'ors*, 1 *Porter's Rep.* 1st ed. 260.

P. MARTIN, *contra*.—To this action the defendant pleaded "covenant performed," and under this state of the pleadings there is no way to get at the question of due diligence.

That matter could only have been raised by means of a special plea: but the plea was affirmative, namely, that defendant had performed his covenants. He was, therefore, bound to prove what he had thus set up in avoidance of the action.

Has the amount been paid? Have the covenants been performed? These were the only questions which the pleadings raised for determination, and the instructions asked were therefore altogether inapplicable.

To the objections to the competency of Thompson, it may be answered, that he was in no way interested. He received the papers as an attorney, and was as competent as though he had never seen the covenant. *Buller's N. P.* 283—5 *Cranch*, 100—6 *ib.* 206—10. *Johns. Rep.* 397.

By Mr. Justice HITCHCOCK:

This is an action of covenant, brought by the defendants in error, as executors of B. Warner, against Thomas Aldridge. The declaration sets out, that on the thirtieth day of Dec. 1820, by a certain agreement between the said Thomas Aldridge, and the plaintiffs' testator, the said Thomas Aldridge, by reference to a memorandum at the foot of said agreement, acknowledged himself to be indebted to the said

B. Warner in the sum of one thousand four hundred and thirty nine dollars and twenty nine cents ; to secure which, the firm of Aldridge, Myers & Pendleton, assigned to the said B. Warner, a number of bonds, which are set out in the agreement, and recited in the declaration ; amounting in all, to the sum of one thousand six hundred and eighty nine dollars thirty eight cents, exclusive of interest ; that the said Aldridge covenanted with the said B. Warner, that in case a full sufficiency should not be made to discharge said debt and interest, then said Aldridge should make good the deficiency.

The plaintiffs further aver, that a " full sufficiency was not made out of the claims assigned ; that certain claims (setting them out) were insolvent at the time of the assignment ; that certain others (also setting them out) became so in a short time after the transfer, and that nothing could be made out of them ; and that on the 20th April, 1831, there remained due, after allowing all that had been collected, one thousand dollars and fifty three cents, which is alleged still to be due, of which the defendant had had notice. The declaration avers, that the plaintiffs have, in all things, kept their covenant ; and charges the defendant with a breach on his part, in not having paid the sum of one thousand dollars and fifty three cents, above stated, according to his covenant to pay said deficiency.

To this declaration, the defendant pleaded in short, " covenant performed," and the plaintiffs subjoined " replication and issue," which are all the pleadings that appear in the case. It appears there was a previous declaration, to which there was a demurrer, which was sustained, and the plaintiffs had leave to file an amended declaration.

At the trial of the cause, below, the plaintiffs prov-

ed by the transcripts from the Courts in Virginia, where the defendant lived, that suits had been prosecuted on all the bonds, not collected, except two ; and that he had used due diligence to collect the same ; that as to those two, he proved by the deposition of one L. Thompson, that they were notoriously insolvent, at the time of the transfer, which fact, he proved, was well known to the defendant : he also proved by said Thompson, that the fact of the insolvency of several of the obligors, was also known at the time of the said transfer. The testimony of Thompson was objected to, on account of his want of competency, he having signed the covenant. It appears that he signed it as attorney at law, and received the claims to collect, as attorney of Warner. The plaintiffs also proved by one Tarver, that at the end of 1831, or beginning of 1832, he, as the agent of the plaintiffs below, gave the defendant notice of the failure to collect a large part of the claims assigned, and that there was a deficiency to satisfy the debt. No other notice, it was admitted, was proved. The defendant objected, that this was not sufficient notice to fix the defendant's liability ; which objection was overruled.

The defendant moved the Court to instruct the jury, "that before the plaintiffs could recover for a deficiency, if on account of insolvency of the obligors in the assigned bonds, that the plaintiffs should tender to the defendant a return of the notes or bonds declared insolvent, or offer to transfer to the defendant the judgments recovered thereon ;" which instruction the Court refused to give. He also requested the Court to charge the jury, "that before the plaintiffs could recover, they were bound to show that they had, within a reasonable time after the assignment of the bonds, made application to the obligors in said bonds

for payment, and that said defendant had notice of their refusal, within a reasonable time thereafter; the evidence of the transcripts of the judgments, which it was admitted were sued on in due time, and that of Tarver, above stated, being all that was given to the jury;" which instruction the Court refused to give. To these opinions of the Court as above stated, exceptions were taken below, and which are assigned for error here.

The objection to the competency of Thompson, was properly overruled. The instrument sued on, appears to have been intended to answer the double purpose of a receipt, by Thompson, as attorney, for the collection of the bonds transferred, as an assignment of the bonds to Warner, and also to set forth the covenants between Warner and Aldridge; and, at the foot of the instrument is a statement of what Aldridge was indebted to Warner. The assignment to Warner, to pay the debt due him, made him the legal holder of the bonds, and the implied covenant of diligence, in the collection of them, was thereby fixed upon him. There is no undertaking of Thompson to Aldridge: his liability is to Warner, and he was no doubt liable to him for the faithful discharge of his duty. But he has no direct interest in the result of this suit, and it cannot be used for or against him in any action which may be brought on his receipt. He was the agent of Warner, in the collection of the bonds; and *ex necessitate rei*, is a competent witness to show what was the result of his efforts.* If this were an action against Warner, for the alleged negligence of Thompson, he would be excluded¹—but this not being the case, the objection only¹ goes to his credibility, and not to his competency.

Before entering upon an examination of the other questions, presented by the bill of exceptions, it will

be proper to look at the state of the pleadings in the case. The covenants contained in the instrument sued on, are clearly dependent: they are treated as such by the plaintiffs. An averment of diligence is made in the declaration, as to the efforts to collect the assigned bonds, and the defendant, had he chosen to do so, might have put the fact of diligence in issue. But the only plea put in by him, is, that of "covenant performed." He does not plead the non-performance by the plaintiffs, of the condition precedent.

* 1 Chitty's Pl.
482.

* 3 Chitty 1002

There is no plea of the general issue in the action of covenant. The plea of *non est factum*, only puts the execution of the instrument in issue, and all other defences in this action must be pleaded specially.* If the defendant had intended to have relied upon the negligence of the plaintiffs, in not collecting the assigned bonds, that should have been set out in a special plea, setting forth particularly, in what that negligence consisted. The plea of covenants performed, only denies the truth of that part of the declaration, which charges the defendant with a breach of his covenant, in not making up the deficiency. The plea, if written out in full, would have stated that the plaintiffs ought not to recover, because he, the defendant, had paid the deficiency claimed in the declaration, and would have concluded to the country;† and this plea does not require the plaintiffs to prove diligence.

Whatever may have been the view, taken by the parties in the trial below, this Court can only look at the case here, as it is presented by the pleadings, and the rules of law applicable to those pleadings. The question presented by this plea, is, whether the defendant had paid the deficiency charged; not, whether the plaintiffs had neglected to prosecute with diligence, for the collection of the notes. In this view of the case, it will be apparent, by a reference to, the

bill of exceptions, that none of the charges asked and refused, were applicable to the issue, as made. What might have made them material, it is not for this Court to decide. And though the plaintiffs may have offered evidence which is not material to the issue, yet that does not authorise the defendant to call upon the Court for instructions upon that evidence; and its refusal to give them cannot be assigned as error. It is sufficient for us, that the issue does not present the question, upon which the instructions are asked.

It is remarked, by Mr. Justice *Livingston*, „ that 1 Craneh, 219 however desirable it may be to admit in evidence on the general issue, in an action of covenant, on a policy of insurance, every thing which may avoid the contract or lessen the damage, as is done in actions on the case, this Court does not know that it possesses the power of changing the law of pleading, or to admit evidence inconsistent with the forms which it has prescribed. No rule on this subject is more inflexible, than, that in actions on deeds, all special matter of defence must be pleaded.”

In the case under consideration, the questions asked, if granted, would have allowed the defendant to set up the fact, that he had never been liable to pay that, which he had averred that he had paid. It is not, however, to be understood, that the instructions asked, in this case, would have been proper to be granted, under any state of pleading. They do not, any of them, directly raise the point of diligence, which, under any possible state of pleading, would be the only defence the defendant could make.

The judgment must be affirmed. In this, the Court are unanimous; though they are not so, upon some of the views presented in this opinion.

BOYINGTON *versus* THE STATE.

After an indictment has been found against a prisoner, and the same has been filed and accepted in Court, he cannot except to the personal qualifications of the persons, selected, summoned and sworn on the grand jury, or plead in bar or avoidance of that indictment, that one of the jurors who preferred it is an alien.

Charles Boyington was indicted and found guilty, in the Circuit Court of Mobile county, for murder. On his arraignment, he plead in abatement of the indictment, that his name was Charles R. S. Boyington; on which issue having been taken, it was adjudged that he answer over to the felony. The prisoner then filed a special plea, averring that one of the grand jurors who preferred the bill of indictment against him, was, at the time of finding, an alien. The Court below, on motion, struck out the plea, but reserved the point as novel and difficult.

OLCOTT, for Prisoner—Contended, that the Court erred in striking out the plea in abatement, which alleged that one of the grand jurors who found a bill of indictment against the prisoner, was an alien. By the rules of Criminal Law, the prisoner must be convicted, if at all, upon the finding of two juries: first, by the grand jury, who determine upon the guilt, in one point of view; and secondly, upon the finding of the petty jury, who establish that guilt in a more direct manner.

In that country from which our law is derived, as well as here, it is well settled, that the jurors upon either inquest, should be *probi et legales homines omni exceptione majoris*. This principle has ever been recognised in England, even in the darkest periods of her history, and the boast of Englishmen has ever

been, that neither their property or their lives could be wrested from them but by their peers. From the time of Conrad down, this principle has been considered as the great bulwark of life and property, and so has called forth the eulogiums of all commentators upon her laws. *Blackstone*, in the 3d vol. of his *Commentaries*, (351,) says—"that the jury is to consist of twenty four of the best men in the county who are called the grand jury." "Those returned to serve on the grand jury, must be *probi et legales homines*, and ought to be of the same county where the crime was committed; and therefore, it is a good exception at *Common Law*, to one returned on a grand jury, that he is an alien, or villain, or that he is outlawed for a crime."—3 *Bac.* 725—*Cro. Eliz.* 654—3 *Just.* 30—12 *Coke*, 99—2 *Rollin*, 82—2 *Hale's P. C.* 154, 155. "Aliens born cannot be returned of juries," (7 *Coke* 18.) As he says, in *Robert Scarlet's* case, 12 *Coke* 99, before referred to—"as was used in the time of his noble progenitors, which was in affirmance of the Common Law." And I believe it will hardly be contended, that it would not have been good cause for challenge, should either of the jurors have been an alien. This is abundantly settled in 6 *Johns. Rep.* 333, *Borst vs. Beecker*—1 *Coven*, 436, and cases there cited. It would seem too, from the very character of a grand juror, as given us in *Blackstone* and in *Bacon*, that it must ever have been considered, that no alien could legally find a place upon a seat so respectable and so responsible as a grand juror's seat—the grand inquest of the county—the peculiar guardians of the lives and liberties of the subject; for no man can be tried until this jury have found good cause for that trial, and so represented to the Court. Why has the learned and eloquent commentator upon the laws of England, given us such a high eulogium upon

trials by jury, and particularly dwelt on the right of being accused and tried by one's peers, if he had not deemed it an invaluable privilege? Is it mere verbiage—words *vox et præterea nihil*—or was there just occasion for such language? It certainly is of the utmost importance that none but "*boni et legales homines*," should ever become grand jurors—men who would feel the responsibility of their station—men who would prefer no charges against a fellow citizen, where the law and the evidence did not compel them. Were it otherwise, how great the mischiefs which might arise : for now, as in the days of Lord Coke, men of high standing, and of character untarnished, might be accused for purposes of profit and advantage, or to gratify the revenge of the accuser ; and it is of great consequence, that men acquainted with our laws and our institutions, should be selected for grand jurors, that they might be enabled to act understandingly upon any charges which might be brought against any individual. This will be seen from a single illustration. A man is charged with high treason : some of the jury are Spaniards—some Chinese, and the remainder are Americans. Can those who compose that panel—some ignorant of laws, and even of our language, be fit men for weighing the evidence, and applying it to the law which would govern in such a case ? Most certainly not. A man is accused of murder—an idiot is found to have a seat upon the grand inquest—would it be competent for such a panel to affix that odious accusation upon a citizen ? Most clearly not. These, and other illustrations would readily occur to the Court, and I need cite no other cases.

But, it may be argued, that the grand jury are merely accusers, and that the guilt is not fixed by their verdict, and so no injury would happen to the

accused. Is this so? Is it no injury to a man of irreproachable character, to be accused by a grand jury of an odious offence? Is not the accusation written upon the records of the Court? And is he not compelled to defend his character, and to appear in the light of a felon? I apprehend that the law is not so impotent, that he would be forced to answer to a charge, unless that charge should be preferred by his equals—men of integrity, of intelligence, and who felt their responsibility. I think the Court are satisfied of the great importance that our grand jurors should be men free from all exception, and that I waste words in farther discussing this point.

We come then to the second and main point in the argument—if there is a remedy, where the panel is not made up of “good and legal men,” can it be had by a plea in abatement? A careful review of all the authorities, and a consideration of the only opportunity which may sometimes be afforded the prisoner to make the objection, will, I apprehend, lead the mind to the adoption of the affirmative of this question. It has been argued, that all the decisions upon the question, whether alienage might be pleaded in avoidance of an indictment, have been founded upon the statute of 11 Henry IV; and as that statute has not been adopted in this state, those decisions would not be deemed authority here. The decisions made at the time, or for a century after, scarcely allude to the act of Henry IV, and so far from it, the cases refer to decisions made previous to that statute. As great stress has been laid upon a passage in *Hawkins*, and as it is supposed that his remarks settle the question, as being the oldest authority upon the subject, whether alienage or outlawry could be pleaded in avoidance of an indictment, it will be important to give to that passage a careful consideration.

That passage will be found in 2 *Hawkins* 296, *sec.* 18. Upon the reading of that section, and the clause in which he says, "it seems to be the general opinion that this resolution was rather grounded upon the statute of Henry IV, c. 9, which was made in the same term in which this resolution was given, than on the Common Law: but it appears from this very same year book, that when this plea was first proposed, it was disallowed, from whence, as I suppose, it is collected, that the subsequent resolution was founded on the authority of the said statute, which may be intended to have been made after the plea was disallowed, and before the subsequent resolution was adjudged good. Yet, considering that the said resolution was given in the beginning of Hilary term, and that the Parliament which made the said statute was not holden before the beginning of the same term, and *therefore it is not likely that the statute was so soon made*, and also considering that the said resolution was given by the advice of all the Judges, who seem to have been consulted about the validity of the plea above mentioned at the Common Law, and *takes no manner of notice of any statute, but only of the law in general*, it may deserve a question, whether such plea be not good at the Common Law." Now, I contend but for the clause in which he says "it was the general opinion," &c.—the whole scope of the reasoning brings the mind to the conclusion, that the plea was adjudged good upon the Common Law. He cites to this "general opinion," 12 *Coke*, 99—3 *Co. Inst.* 30—*Crown Cas.* 134. I have examined with some care, the decisions referred to, and cannot perceive that they sustain that opinion. The case cited from 12 *Coke*, is *Robert Scarlet's* case. He was indicted for procuring himself to be summoned of the grand inquest, with intent to indict his neighbors ma-

liciously; and the only question in that case, was, whether he could be punished under that statute. The plea was, not guilty. It will be perceived, that this case does not touch the question, whether alienage might be pleaded in avoidance, and does not, of course, give any opinion, that alienage could not be pleaded by the Common Law, in avoidance of an indictment: and the page referred to, in *Coke's Institutes*, merely says, for what cause a juror may be challenged, to which reference has been made in the argument. And, the other case referred to, is *Calvin's*, (7 *Coke's Rep.* 18)—and the point was, whether an alien might bring a suit in the Courts of England; and the plea there was, that the plaintiff ought not to be answered, because he was an alien born; and for divers reasons, among which are, “for that aliens born cannot be returned of juries for the trial of issues between the King and the subject.” But the point, whether alienage or outlawry would be a good plea in bar or avoidance of an indictment, did not arise; and a case in *Cro. Car.* 134, (*Sir Wm. Withipole's* case,) would seem to show, that the plea referred to by *Hawkins*, must have been made upon the Common Law, which will appear from a reference to the case. He was indicted for the murder of Magason, and pleaded that two of the grand jurors were outlawed, which plea was founded on the statute of Henry IV, above mentioned; and the Court say, “because *this was the first plea that had been upon the statutes*, and would be a precedent in Crown matters, the Court would advise.” The plea was sustained. So, in *Croke's Eliz.* 751, (*Hammond vs. The Queen*)—*Gandy*, who appeared as counsel, objected that the jurors were not said to be *pro borum et legalium hominum*, and referred to the Year Book, to which *Hawkins* refers, and says nothing of the statute. From these references, and

from an examination of the section by *Hawkins*, I think the Court will be perfectly satisfied that the plea in avoidance was grounded, not upon the statute of Henry, but upon the Common Law. The twelve Judges had been convened for the purpose of deciding upon a point—that is, upon the plea, which had been previously proposed and disallowed. The former opinion, of course, had been made upon the Common Law, for it was then some time before the passing of the statute, or the sitting of Parliament, as the decision after was made at the beginning of Hilary term, and that the Parliament which made the same statute was not holden before the beginning of the same term; and as I shall shew from a case reported in *Curran's Speeches*, page 275, in the trial of the *Shearers*, that that statute did not receive the royal assent until the fifteenth day of Hilary term. Now, is it not a most fair presumption, an almost irresistible inference, that, called as the Judges were, to decide upon a plea at *Common Law*, (for it will be borne in mind that the statute had not then been passed,) and to overrule a decision which had been previously made, that as they made no mention of, or allusion to the statute—that the time of making the second resolution or decision, was previous to that when this statute received the royal sanction. And will not a reference to all Reports show, that the Judges themselves would have saved themselves the trouble of deciding a difficult point of Common Law, when a statute had been passed directly upon that law. If the statute had been passed, and the decision was founded upon that statute, they might have said, and undoubtedly would have said, in the language used by all Judges, early and modern, that as Parliament had passed a law upon the subject, they were only to expound and declare that law. It was

not statute law which they were called upon to decide, but upon a point growing out of the Common Law, and as the previous decision had been made upon the Common Law, the latter most clearly went upon the same in overruling the former, as no reference was made in the decision to the statute. The Judges could have taken no time to consider the statute, as will appear from a reference to the authorities cited from *Hawkins* and *Curran*, as to the time of the decision and passing of the law; and would they have decided upon the statute without taking any time for consideration, more particularly when that statute was in direct conflict with a previous decision. Furthermore, Parliament would not have passed a law, without, at the same time, providing a remedy, except upon the knowledge that a remedy existed at Common Law. No remedy was provided by the statute of Henry, and it is a fair and legitimate conclusion, that the resolution of the twelve Judges was made antecedently to the passage of the statute, and this statute being merely affirmative of the Common Law, and the remedy upon the Common Law being settled, it would have been superfluous to have created one.

I beg the Court, once more, to examine the reasoning employed by *Hawkins*, in the passage cited, and see if it is not evident that his mind inclined to the belief that the plea was adjudged good at Common Law, but for the cases which he supposed made the contrary opinion the prevailing one. It is said in 3 *Bacon's Abr.* 725, "that the exceptions to a jury must be taken before the indictment found," and cites the authorities from *Coke's Inst.* and *Coke's Rep.* which I have examined: but all the decisions of later times, as well as *Bacon*, refer to the decision of *Hawkins*, as settling the question, and unless I have entirely mis-

apprehended that author, he does not decide that the plea would have been bad at Common Law. Even in the dark and gloomy period of Ireland, when the blood of her choicest sons flowed like water, to allay the fears of an arbitrary and jealous despotism, when the Judge was appointed for the sole purpose of sacrificing, under the sacred name of law, and under its forms, him, who had made himself obnoxious to the tyrant, by daring to sigh for the blessings of a well regulated liberty—even then, pliant as was the Judge, the Court was inclined to believe that the plea might be good at Common Law; and gives the reasons, and puts the decision of the cause upon what was supposed were tenable grounds: And Lord Carleton says, “From a manuscript note which I have made in my *Hawkins*, I perceive the statute received the royal assent in ——— *Hilarii*, which was on the 27th or 28th of January, and might, perhaps, have preceded the decision referred to by *Hawkins*.” He also “supposes, that the decision in *Hawkins*, gave the prisoners a right of pleading.” One consideration more upon the passage in *Hawkins*, and I have done with it. The Court will bear in mind, that the decision was made early in the session of Parliament, and probably before the passing of the law. This decision, that the plea was disallowed, *Hawkins* says was made in the same Year Book of 11 *Henry IV*. It was probably decided at the assizes by one of the Judges, where I think all criminal cases were tried, and the point being a difficult one, was reserved for the opinion of the twelve Judges. Now even admitting, for the sake of the argument, that the statute had been passed, still, the question having arisen before it was passed, the Judges could not have considered it, because the statute would have had a retrospective effect. Suppose, since the decision of the Judge below, striking out

the pleas, the Legislature had passed a general act, that all pleas in avoidance of an indictment that one of the grand jurors was an alien, should be good and available—not relating back to previous proceedings, would this Court have considered that act in settling a case which had arisen previous to the passage of that act? Most certainly not. It would seem that the doctrine in *Hawkins* cannot be made to weigh against the position I have attempted to maintain.

A remark of Lord *Bacon* is relied upon by those opposed to the plea, as decisive against it. He says, in his *Abridgment*, page 725, "*It is said*, that these exceptions must be taken before indictment found;" and he refers to *Cro. Ca.* 134, 147—3 *Inst.* 32—12 *Coke* 99—2 *Hale's P. C.*—all which authorities have before been examined, and none of the authorities sustain that position; and as his remark is bottomed upon the authorities which he cites, it will not hold good, unless sustained by them. I have now examined all the authorities in the older books, which are relied upon by those who object to this plea. A case in 9 *Mass. Rep.* (*The Commonwealth vs. Smith*,) is cited as an authority against the plea. But for an *obiter dictum* of the Judge who gave the opinion, which *dictum* has since been overruled in the same Court, it could not avail as an authority against the plea. The prisoner was indicted for corruptly taking and receiving usurious interest, and one Thomas Wing, a Quaker, did not take the oath prescribed by the statute. There was no objection to him on any other ground: there was no question he was *bonus et legales homo*. *Sewall*, Judge, says—"objections to the personal qualifications of the jurors, or to the legality of the returns, are to be made before the indictment is found." He goes on to say—"But without resting upon this, and admitting the defendant to have the

full benefit of the exception, if it ought to avail him, or if the impannelling of the grand jury, under the direction of the Court, was, in point of law, liable to the objection now stated ;" and then goes on to decide the case upon another point. So, it will be perceived, that the Judge himself did not rely upon that *dictum*—the case did not turn upon it—and, according to a well established rule, recognised by the Supreme Court of the United States, in *Sturges vs. Crowningshield*, that the positive authority of a decision is co-extensive only with the facts on which it is made.—4 *Wheaton's Rep.* 122—*Ogden vs. Saunders*, 333. This being merely a *dictum* of the Judge, and not relied upon as settling the case, and not presenting the same facts which this case does, is not a positive authority. But, the Court will perceive, that this same case is overruled in *Commonwealth vs. Parker & al.* The Chief Justice says—"The books say that grand jurors also may be challenged : but there is a difficulty in the case, for a bill may be found against a person who has not been recognised to appear, and who has no opportunity to challenge. The case of *The Commonwealth vs. Smith*, 9 *Mass. Rep.*—if we should adopt the remarks there made on this subject, to their full extent, would put an end to this motion in arrest. It is there said, that objections to the personal qualifications of the grand jurors, or to the legality of the returns, are to be made before the indictment is found. It is not necessary to apply the remark here, and we have some doubts as to the correctness of it in all cases; and the case in which it was made, was determined upon another point."—2 *Pick. Rep.* 563.

I think I have established the position, that the plea was good at Common Law, and have met the authorities which have been presented against it, and that the Court will be satisfied that the law guaran-

tees to every citizen the right of being accused as well as tried by his peers—by good and lawful men—by men free from every exception. And the Court will perceive, that cases may and do frequently arise, that if the objection to the personal qualifications of a juror may not be made after indictment found, the right would be of no avail to the accused. For it frequently happens that a bill may be found against a person who has not been recognised to appear at the Court, and of course he could make no challenge; or that he was in prison loaded with shackles, and ignorant of all proceedings against him. Now, it would be a mockery in either of these cases, to say to the individual, you have the right guaranteed to you to be accused and tried by your peers, but because the bill is found, though you had no opportunity to appear, you are too late to object that some of the jurors are outlawed—some aliens, and otherwise disqualified. It would seem that the law is not chargeable with such an absurdity.

It has been supposed even if an alien might not legally set upon the grand inquest, still, that we could not get behind the indictment to make the objection: but the contrary doctrine is settled in 2 *Gallison's Reports*, 364.

On the authorities which I have quoted, and from the great favor which is shewn to the accused in *favorum vite*, I feel a strong confidence that the judgment of the Court below will be arrested.

BREEDIN, *Solicitor*.—The first question here, is, whether these two pleas, if they might at any time be legally pleaded, ought not to have been filed before the first plea in abatement was submitted to the jury. Suppose them, for argument sake, to be allowable by the rules of the Common Law, many other matters,

then, may be pleaded in the same way; and if the accused be permitted to plead and try them, one at a time, for two several days, there is nothing to restrain him from filing and trying one at a time, for a series of days, until the whole term of the Court be exhausted, in the disposition of his collateral issues. Nor could he be restrained from employing succeeding terms of the Court in like manner, while there yet remained any matter to be embraced in a plea.

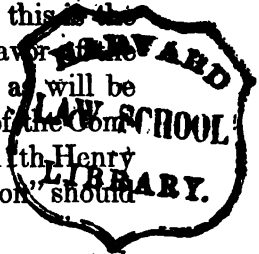
This is not the only, or principal ground, however, upon which the pleas were disallowed. The first plea sets forth, that George Davis, jr. one of the grand jury that found the indictment, was not, at the time of such finding, a citizen of the United States—but, on the contrary, was a natural born subject of the King of Great Britain, and had never been naturalized. And the other, sets forth, that Chandler Waldo, also of the grand jury that found the indictment, had, before he was sworn, formed and expressed an opinion as to the guilt or innocence of the prisoner. These exceptions, as to the qualifications of grand jurors, it is thought, cannot be legally taken after indictment found. If they can, it must be by virtue of some statute, or by the rules of the Common Law—*Hawkins* (Book 2, chap. 25, sec. 18,) says, "It is resolved in the Year Book of 11th Henry IV, by the advice of all the Justices, that one outlawed on an indictment of felony, may plead in avoidance of it, that one of the indictors was outlawed for felony." "But," he continues, "it seems to be the general opinion, that this resolution is rather grounded on the statute of 11th Henry IV;" and after some reasoning, he concludes by saying, "it deserves a question whether it be good at Common Law." From the phraseology of this latter clause of the section, it is evident that the question was not equally balanced in the au-

thors mind. The plea is good, or it is not good.— Now, if it barely deserve a question whether it be good, the balance between the plea and the doubt, would be, evidently, in favor of the plea. But the question is, whether it be *not* good at Common Law: assuming that it is not good, and applying the doubt in this shape, “it may deserve a question,” &c. There may seem a little too much refinement in this criticism: but when it is considered that this is the only authority that has any leaning in favor of the pleas, and that the books on criminal law, as will be presently shewn, allow them, not by force of the Common Law, but by virtue of the statute of 11th Henry IV, it is important that the doubt or “question” should have its proper application.

By the statute of Westminster 2d, it was enacted, that old men above the age of seventy years—persons, perpetually sick, or infirm at the time of summons, or *not dwelling in the county*, should not be put in juries or lesser assizes. Yet, it was never held unlawful for any such persons to sit on grand juries, if they thought fit—*Hawkins*, book 2, chap. 25, sec. 20.

The statute of 28th Edward I, required sheriffs to empanel such as were ordained by statute—next neighbors and least suspicious; and it provided punishments for infractions thereof. And the statute of 23d Edward III, required all panels to be made of the next people, which should not be subject or procured. But it cannot be shewn, nor does it any where appear, that when any of the provisions of these statutes had been neglected or omitted, indictments could be abated or avoided, in consequence of such neglect or omission.

The principal statute, however, is that of 11 Henry IV. Its preamble recites, “that now of late, inquests were taken at Westminster, of persons named



to the justice, without due return of the sheriff; of which persons, some were outlawed before the said justices of record, and some fled to sanctuary for treason, and some for felony, there to have refuge; by whom, as well many offenders were indicted, as other lawful liege people of our Lord the King, not guilty, by conspiracy, abetment and false imagination of other persons, for their special advantage, and singular lucre; against the course of the Common Law used and accustomed before this time." It was therefore enacted, "that the same indictment so made with all the dependence thereof, be revoked, annulled, void, and holden for none forever." Here, then, is the authority under which pleas in abatement or avoidance of an indictment were maintainable. An indictment is, to all intents and purposes, a record of a Court; and at Common Law no record can be questioned or controverted by a plea. It sets forth that the indicters are good and lawful men, because they have undergone the legal tests that authorise this part of the record. And although the caption of the indictment itself might not show them to be good and lawful men, yet it has always, in England, been sufficient, if it could be shown by the other parts of the record: and it certainly does, as it did in England, require the force of a statute to disturb that record. We have no such statute.

That there had been great abuses of the Common Law in England, in this particular, it is evident from the preamble to the statute of 11th Henry IV. Persons had sat upon inquests without due return of the sheriffs—some had fled to sanctuary for treason and felony: yet, for these Common Law disqualifications, it was no where pretended that a plea in abatement, or in avoidance of an indictment found under them, was good; nor has any been sustained, that is not ex-

pressly said to be by force of the statute of 11th Henry IV. It is true that there is nothing contained in the statute which disqualifies an alien; but it may be admitted that if either of the exceptions embraced in the statute, can be pleaded at Common Law, so can any matter impugning the Common Law qualifications of grand jurors be pleaded also.

“Those returned to serve on grand juries, must be *probi et legales homines*, and ought to be of the same county where the crime was committed; and therefore, it is a good exception at *Common Law*, to one returned on the grand jury, that he is an *alien*, a villain, or that he is outlawed for a crime, or that he was not returned by the proper officer, or that he was returned at the instance of the prosecutor; *but these exceptions must be taken before indictment found.*”—*Bac. Abr.* (Juries A.)

Then, if the qualification of grand jurors are not to be questioned and controverted by pleas, after indictment found, at what time are they to be questioned? It is at the time they are to be sworn. The Court will interpose, upon its own knowledge of exceptions, or, upon suggestion. Every person in the community has a right to be heard touching exceptions, because each member of the community is, at least, liable to an accusation. The action of grand juries, in practice, is not limited to enquiries about offences actually committed, or of individuals actually guilty: by possibility they may accuse wrongfully; and the right, secured by the Common Law, to take exceptions before they are sworn and the record made up, is for the protection of the innocent; and not, by a perverted and incongruous system of pleading, for the advantage of the guilty. There is no rule better settled, than, if an indictment omit to state that it is found by good and lawful men, and that the omis-

sion cannot be supplied by the other parts of the record—that it is insufficient. Are the words, good and lawful men, then a mere mockery; or, are they significant of the judgment, in that particular, of a competent Court? It should seem that the Court, having allowed all the scrutiny authorised by law, had rendered its judgment, that the grand jurors were good and lawful men, and that nothing short of a positive statute could disturb that judgment.

The statute of Westminster the 2d, and every succeeding statute, down to that of 11th Henry the 4th, appears to be an effort to reach abuses, which might have been pleaded in abatement or in avoidance of indictments, if such pleas had been allowed by the Common Law. And yet it does not appear that any attempt to plead them, had ever been made, until just before the time at which the last mentioned statute was enacted; when the plea was disallowed. Nor was it afterwards allowed, until, by strong probability, the statute became in force. At least, all the authorities credit the allowance of the pleas to the statute itself.—2 *Hawkins*, chap. 25, sec. 33—*Bacon*, folio ed. 234—1 *Chitty* 252.

The statute of 3d Henry the 8th, provides for reforming the panel, very much in the manner of the Alabama act of 1826; and it was resolved by the twelve Judges in England, that indictments might be avoided in the same manner as before, by force of the statute of 11th Henry the 4th, except the nomination be made by the Justices, authorised by 3d Henry the 8th, to reform the panel. Now, if the statutes be alike in their provisions, and the record here shows that the panel was reformed under the act of 1826, unless the resolution of the English Judges be erroneous, the reform of the panel here is conclusive, that the jurors were good and lawful men.

It is sometimes urged that, at Common Law, grand jurors were required to be of good and lawful men; and that the statute of 11th Henry the 4th, was but in affirmance of the rule. This is conceded—except so far as the statute provides that indictments found contrary to its provisions *shall be void*. This part of the statute is certainly not declaratory of the Common Law: for indictments could only be declared void on pleas; and it has no where been allowed, at Common Law, that a record could be controverted in that manner. Such was the principle of the decision in the case of *The Commonwealth vs. Smith*,—(9th Mas. Rep. 107,) and such, too, is believed to have been the principle which actuated Chief Justice *Marshall*, in the trial of Aaron Burr, when he said “this is the time” (before they were sworn,) “when the accused has a right to take exceptions to the grand jurors.”

Then, it may be asked, how can effect be given to the Common Law, of which, the other parts of the statute are but declaratory. The answer is plain. The laws have imposed on the tribunals of the country, and the officers of justice, an obligation to select for jurors none but good and lawful men; and if that be omitted or disregarded, there is no less an obligation on the Court, upon its own knowledge of exceptions, or upon suggestions of them from any quarter, to purify the grand inquest from all obstacles to a free, impartial, and legal administration of public justice. These suggestions of exceptions, before, or at the time the jurors are about to be sworn, may come from any person, since every person is liable to the animadversion of the grand jury. It should be remembered, too, that the proceedings before that body are but *ex parte* preparations—mere accusations, and constitute in themselves no part of a trial whatever.

If exceptions might be taken after indictment found, it would become the policy of the guilty to look and be silent when they saw exceptionable persons about to be empanelled and sworn. They cannot be known to the presiding Judge, or the officers of Court, by intuition; and guilty persons knowing them, would reserve their disclosures until after indictment found, that they might have other chances of more favorable returns; or of taking similar exceptions *ad infinitum*.

All persons, whether previously accused before examining magistrates, or not, stand precisely on the same footing before the grand jury and the laws. There is no distinction to be found in the books, between such as have been imprisoned for trial, recognised, &c. and such as never had been accused or suspected of crime, until complaint made to the grand jury. There are no privileges extended to the one, that may not be legally claimed by the other. And since all are liable to indictment, each has the right to take exceptions to the qualifications of the indictors before indictment found, but not afterwards.

Any other rule, without further legislation, would render the criminal code a mere mockery. The sheriff of a county, in obedience to his duty, makes his biennial return of the householders and freeholders of his county: The Judge of the County Court, the Commissioners of Revenue, the Sheriff, and the Clerk of the Circuit Court, reform the panel, and select such as are qualified to serve on juries. The Judge of the County Court, the Sheriff and the Clerk of the Circuit Court then draw the jury—they are summoned and returned, and in open Court, in presence of the whole assembled community, the grand jurors are selected from the entire panel by lot. A stranger Judge presides—he knows nothing of exceptions, nor do the

officers of Court; but the guilty, sit by—perceive exceptions, and refuse to disclose them. The grand jury is sworn and charged; and the record, that they are good and lawful men, is made up. An indictment is found, and the accused pleads that one of the jury was born in England, and was never naturalised. The Court directs the prosecutor to take issue, and it is found for the accused. Here is, not only the end of that accusation, but, an end to every criminal procedure for the whole term; for it would be idle to suppose that any other person accused would forego his right to the same exception—since, in taking it, without touching the merits of his case, he would be certain of a triumph. Or, can the Court empanel a new grand jury; or supply the places of those, against whom the exceptions were taken, after the record is made up? It does not so appear, either by statute, or by the common law. So that in taking and maintaining an exception, which could, by possibility, only be known to him, it would allow one guilty person, or one accused of crime, at the very threshold of a term of the Court, to subvert the public justice of the country.

Having shewn, then, as I humbly conceive, that the Court below did not err, in ordering the two pleas to be stricken out—first, because they were not pleaded at the proper time; secondly, that pleas in abatement or in avoidance, that go behind the record, are not authorised by the common law, but only by statute, and that there is no such statute in force in the State of Alabama; and lastly, that the statute of 1826, where its provisions have been complied with, is conclusive as to the character of grand jurors, the question is submitted on the part of the state.

The Attorney General (MARTIN,) argued this case

CASES DETERMINED

BOYINGTON VS. THE STATE.

fully on the part of the state, but as the numerous duties of this gentleman did not permit him to draw out his argument, and as the Reporter could not do justice to it by reference to his own notes, it is unavoidably omitted.

By Mr. Chief-Justice SAFFOLD :

The prisoner, Boyington, was indicted in the Circuit Court of Mobile county, for the crime of murder, alleged to have been committed on the body of one Nathaniel Frost. After the indictment had been found against the prisoner, charging him by the name of Charles Boyington, he pleaded in abatement that he was known and called by the name of Charles R. S. Boyington, which was his proper name, and not that of Charles Boyington, &c. To this plea the *Solicitor* filed a replication, taking issue thereon.

This issue, on the 15th day of November, 1834, (being a day of the term of the Court,) was submitted to the jury, who returned a verdict against the prisoner that his plea was untrue.

Two days thereafter, the prisoner filed his two other pleas in abatement.

1. That George Davis, jr. one of the grand jury that found the indictment against him, was not a citizen of the United States of America, or of any one of the same, but a subject of the Kingdom of Great Britain and Ireland, and had never been naturalised.

2. That one C. Waldo, another member of the same grand jury, previous to his being elected and sworn, had formed and expressed an opinion respecting the prisoner's guilt or innocence, by saying, if he should be on the jury to try him, he would hang him.

These two latter pleas, on motion of the Solicitor, were, by the Court, stricken out, as being illegal and

insufficient, and a *respondeat ouster* was awarded. After which, on the 20th of the same month, the prisoner having been arraigned, pleaded *not guilty*; whereupon a trial was had before a petit jury, who returned a verdict of *guilty*: on which, judgment was pronounced.

At the trial, however, the presiding Judge reserved for the consideration of this Court, as novel and difficult, the question, whether or not there was error in the decision of the Court, ordering the two pleas, as stated, to be stricken out.

This, alone, is the question presented for the consideration and decision of this Court.

No objection is made to the sufficiency or regularity of the record, other than as mentioned. The grand jury appear to have been selected by the agency, and under the inspection of the judge of the county court, and commissioners of roads and revenue, together with the clerk and sheriff, in the mode prescribed by the statute; and the indictment purports to have been found by sixteen "good and lawful men of said county, impanelled, sworn and charged," &c.

Whether the plea in abatement, on the ground of the alleged *misnomer*, (in as much as it related alone to the initials of the middle name, affecting neither the *christian* or *sir name* of the prisoner) presented a material issue? and whether, if considered *material* or *immaterial*, the fact of its having been pleaded, and found against the prisoner, could affect his right to the benefit of any subsequent plea in *abatement*, is a question which, under the views we have taken of the other points in the case, is unnecessary to be examined in arriving at a decision of it.

In reference to the question reserved, I consider it a well established principle of the common law, that grand, as well as: petit jurors, must be *probi et legales*

Bacon's Abr.
Juries A.

homines: therefore, it is a good exception to one returned on a grand jury, that he was an *alien*, or *villien*, or that he was *outlawed* of a crime, or that he was returned by the proper officer, or that he was returned at the instance of the prosecutor; *but it is said these exceptions must be taken before indictment found.*"^a

Aik. Dig. 295.

By the statutes of this state, these disqualifications are not expressed; it is only provided that, "No person under the age of twenty one years, or above the age of sixty, nor any person continually sick, or who may be diseased at the time of the summons, nor any person who has been convicted of any felony, perjury, forgery, cheat, or conspiracy, or offence; (*crimen falsi*,) shall be summoned on a jury." Yet, I would not hesitate to recognise the common law disqualifications as being in force with us, so far as they are known to our law, and the same reasons can apply in all cases, where taken in due time and in proper form.

Bacon's Abr.
Juries A.

But, it is necessary to observe, that as early as the 11th year of the reign of Henry IV, an English statute was passed, reciting in the preamble, that extensive injustice and oppression had arisen to the lawful liege people of the King, from inquests taken at *Westminster*, by persons named to the justices, without due return of the sheriff; of which persons, some were outlawed, and others had fled for refuge to sanctuary for treason and felony; therefore, it was declared, for the ease and quiet of the people, that indictments so found should be revoked, annulled and for nothing held; and that thereafter, no indictments should be made, but by the King's lawful liege people, duly summoned by the proper officer; and that any indictment otherwise found, should also "be void, revoked, and forever holden for none."^b

The finding of an indictment gives to it the dignity of a record; and it is a general principal of the common law, that no plea shall be admitted, to impugn the verity of a record; yet, that such plea may be authorised by statute, none will question; and it appears that the statute referred to, had this effect. Under its authority, the Courts of England decided, that any person arraigned on an indictment, taken contrary to the statute, might plead such matter in avoidance of the statute, and also plead over to the felony.”

^aHawk. book 2
ch. 25, § 33.—
Bac. Abr. Ju-
ries A.—1 Ch.
Cr. Law, 352.

At a subsequent period in the 3d of Henry VIII, another act of Parliament passed, directing that all panels of grand jurors to be returned by the sheriffs and their ministers before the justices of jail delivery, or justices of the peace, whereof one to be of the quorum, in their open sessions, should be *reformed* by putting to and taking out of the names of the persons so impanelled, by the discretion of the justices, and that they should command the sheriffs to put other persons in the same panel, and *when so reformed should be “good and lawful.”*^b

^bIdem.

The English judicial decisions have farther ruled, that this latter statute does not take away the force of that of 11 Henry IV, except so far as they are repugnant; and therefore, if any indictor be outlawed, or returned at the nomination of any person, contrary to the statute of 11 Henry IV, *except of the justices, under their authority to reform the panel as aforesaid*, the indictment may be avoided by plea, as in the former case.^c

^cBacon's Abr.

Since the statute referred to, of Henry IV, pleas in avoidance of indictments, for objections to particular jurors, principally on the ground of outlawry, have, in many instances, been allowed in England; yet, much difficulty has also been felt and expressed,

on the question whether such objections can be pleaded in abatement ; or according to a different phraseology, in avoidance of the indictment. Previous to that statute, there seems to have been no instance of it.

An eminent Jurist remarks on this subject, " that it was resolved in the Year Book of 11 Henry IV, by the advice of all the justices, that one outlawed on an indictment of felony, may plead in abatement of it, that one of the indictors was outlawed for felony, &c. But it seems to be the better opinion, that this resolution is rather grounded on the statute of 11 Henry IV, which was made in the same term in which this resolution was given, than on the Common Law; because it appears by the very same Year Book, that when this plea was first proposed, it was *disallowed* : from which, I suppose it is collected, that the subsequent resolution was founded on the authority of said statute, which may be intended to have been made after the plea was disallowed, and before the subsequent resolution, by which it was adjudged good. Yet, considering that the said resolution was given in the beginning of Hilary term, and that the Parliament that made the statute was not holden before the beginning of the same term, and therefore, it is not likely the statute was so soon made ; and also, considering that the said resolution was given by the advice of all the Judges, who seem to have been consulted about the validity of the plea above mentioned, at the Common Law, and takes no manner of notice of any statute, but only of the law in general, it may deserve a question, whether such plea be not good at Common Law."

* 4 Hawkins,
book 2, ch. 25,
§ 18.

I have thus quoted the section at length, because I discover the question there suggested, has been uniformly referred to as the authority for such pleas in abatement, and has been the source of much doubt

and speculation in that country, and this, ever since. The difficulty has been to determine, whether any right to plead in avoidance of an indictment for the incompetency of particular jurors existed at Common Law, or whether it had its origin in the statute of 4th Henry, and consequently can exist only within that Kingdom and its dependencies.

As I have already shewn, the principle maintained by *Bacon*, is, that the right in England, so far as it exists, was derived from the statute, and that, at Common Law, the exception can only be taken by challenge to the juror before indictment found. The principle is clearly recognised, by all who have treated of the subject, that it is the duty of the Court, if informed of any legal objection to a person about to be sworn on the grand jury, to exclude him ; also, it is the acknowledged privilege of all persons present, of those anticipating prosecutions, or others, as the friends of the Court, to point out the objection, and cause the exclusion of the juror.

*Chitty** remarks, that, if a man who lies under any legal disqualification, be returned on the grand jury, he may be challenged by the prisoner before the bill is presented ; or if it be discovered after the finding, the defendant may plead it in avoidance, and answer over to the felony. That this necessity for the grand inquest to consist of men free from all objections, existed at Common Law, and was affirmed by the statute of 11 Henry IV, "which enacted, that any indictment taken by a jury, one of whom is unqualified, shall be altogether void, and of no effect whatsoever ;" also, he says, "that a defendant before issue joined may plead the objection in avoidance ; but if he take no such exception before his trial, it seems doubtful how far he can afterwards take advantage of it," &c. It however appears from his references, that he re-

* *Crim. L. 1 v.*
307, ch. 6.

lies for his position respecting the right to plead in avoidance, on the authority of the Year Book, and expressions of *Hawkins*, together with some adjudications under the statute of England, to which I have referred, and which sustain him only so far as has been shewn.

It also appears, that on the trial of the *Shearers*, in Ireland, in which the right claimed in this case, was brought in question, (but a decision of which was not considered necessary in disposing of that case,) that Court did not consider the right to plead this matter in abatement, as having been established. Lord *Carleton*, in expressing the opinion of the Court, uses this language: "That a person being an *alien* is a good cause of challenge, I think is well founded, but whether it can be taken advantage of by way of plea, I reserve my opinion." Again, he says, "that a juror is *outlawed* may be taken advantage of by plea of avoidance of the indictment, but whether such plea is given by the Common Law, or depends on the statute of 11 Henry IV, is a question of some difficulty; that it was passed about the same time with the case mentioned by *Hawkins*." He further said; that "From a manuscript note which he had made in the margin of his *Hawkins*, he perceived the statute received the royal assent in *quindina Hillaris*, which was on the 27th or 28th of January, and might, perhaps, have preceded the decision referred to by *Hawkins*."

It appears, from a review of the authorities so far, that the existence of this right, at Common Law, is at most, very doubtful; but that even if the principle was conceded, this right was allowed while the law of England confided to the sheriff and his ministers, the absolute and exclusive power and duty of nominating and returning on the panel of the jury such persons

as they chose to select, and when it had become usual for outlaws, traitors, and felons, through the contrivance or inadvertence of these officers, to foist themselves into the panels to effect oppression, or otherwise pervert justice;—that, to prevent these evils, the justices resolved, (Parliament enacting a similar provision about the same time,) that such objections should be available by plea in abatement. If it remain doubtful whether the resolution, or the statute preceded, such as I have described were the evils to be guarded against, a necessity which has no existence under our law. Our panels, as we have seen, are subjected to a more effectual scrutiny than those in England, as prescribed by the statute of 3 Henry VIII, and which we have also seen had, in the opinion of the English Judges, the effect to supercede the necessity of, and exclude the right to plead this matter in avoidance.

To shew more definitely the manner in which our juries are scrutinized and selected, reference may be had to the statute,* where it is provided, that, on each return of the sheriff to the clerk of the Circuit Court, of a list of the freeholders and house-holders within the county, the judge of the county court, with the commissioners, clerk and sheriff as aforesaid, shall, on a day appointed for the purpose, assemble at the court house of the county, and select from such list, such persons as they or a majority of them may deem qualified to serve on juries, and the names of the persons so selected, shall be put into a box to be kept by the clerk for that purpose; and the persons thus *selected shall be liable to serve on juries*; and shall be further chosen by lot, in the manner prescribed by a previous statute.

It is true, that the English statute referred to, of Henry IV, did not express the right to plead matters

*Aik. Dig. 298.

of this kind in avoidance; it virtually secured the right, by declaring all indictments otherwise found, *null and void*, and to be for nothing held. It is equally true, that the subsequent statute of Henry VIII, did not expressly inhibit this right of pleading, yet it denied it by sufficient implication, when it declared that the panel *reformed* as therein directed, should be "*good and lawful*." Both these points of construction have also been well established by the uniform current of English decisions. *Hawkins** also maintains these positions in nearly the same language already quoted from *Bacon*. He says, "It hath been resolved, that the statute of 3 Henry VIII, doth not take away the force of the above recited statute of 11 Henry IV, in any point wherein it doth not expressly vary from it; from whence it follows, that if any of the jurors who find an indictment be outlawed, or returned by a sheriff or bailiff, at the nomination of any other person, the indictment may be avoided in the same manner as before, by force of the 11th Henry IV; except such nomination be made by the Justices, authorised, by 3d Henry VIII, to reform that panel."

*Hawk. book
2. ch. 25, s. 33.

From this declaration (the latter clause particularly) the conclusion obviously results, that such jurors as had been approved of and nominated by the justices should be considered, in the language of the statute, "good and lawful men," so far at least, as to make their indictments valid and conclusive, if objection were not made before they were found. Then the farther conclusion appears to me to be equally irresistible, that as our mode of selecting the jury is better guarded, our lists of jurors being subjected to a closer examination and purgation, than can be expected from the English mode of *reforming theirs*—on principle and authority, the right of pleading to the personal disqualifications of particular jurors, who

have been selected pursuant to the statute, must be denied.

These views of the case are no less applicable to the 3d plea in abatement.

The matter of this plea—the formation and expression of a previous opinion by the juror against the prisoner, must rest on the same or a less valid ground of objection. As respects the difference, it is, on this occasion, only necessary to remark, that the expressions imputed to the juror Waldo, might not be considered conclusive of his incompetency. Had an examination been had on challenge of the juror, or in any other proper manner, it might have been found that the expression of the juror was intended, and understood only as a matter of levity or jest, or that the juror was prompted to it by mere rumor, and had either retracted the expression, or was ready to do so; that he had no knowledge or satisfactory information of the facts—no enmity or prejudice against the prisoner, and that he felt his mind perfectly open to conviction upon legal evidence.

But, without pursuing this point farther, I proceed to a further notice of the right, in general, to plead in abatement, the incompetency of particular grand jurors.

Questions of this kind, appear to have been of very rare occurrence in the United States. But, in the case of *The Commonwealth vs. Smith*,^{9 Mass. Rep. 107.}—the defendant, having been indicted for usury, pleaded in abatement, that one of the grand jury, *Thomas Wing*, being of the denomination of Quakers, did not take the legal oath as grand juror. It appears from the replication and demurrer thereto, that the juror being scrupulous of taking judicial oaths, had only *affirmed*.

Sewall, Judge, in delivering the opinion of the Court, said, "Whether an exception of this kind is

to be received at this stage of the proceedings, is a question which seems not to have been finally determined." He further remarked, that "Indictments not found by twelve good and lawful men, at the least, are void and erroneous at Common Law; and the circumstance that it was found by twelve men is stated in the caption of every indictment, according to the English forms and practice. But this formality has not been observed with us: and the omission is not to be objected to in indictments found according to our practice, viz: "The grand jurors of the Commonwealth on their oaths present," &c. An irregularity in this respect, if it should happen, might become a subject of enquiry upon suggestion to the Court; for, under their superintendence the grand jury is constituted, and must be understood to have the legal number of men. This being the construction to be given to the record, after an indictment has been received and filed by the Court, no averment to the contrary can be admitted as a *formal plea*. Objections to the personal qualifications of the jurors, or to the legality of the returns, are to be made before the indictment is found; and may be received from any person who is under a presentment for any crime whatever; or from any person present, who may make the suggestion as *amicus curie*." But Quakers (as was held by that Court,) are capable of serving as grand jurors, and the affirmation by them, under the various statutes, was considered sufficient.

* 2 Gallison,
334.

In *U. States vs. Coolidge*,* after the indictment had been found, it was discovered that the grand jury had received testimony of a person not under oath, and this satisfactorily appearing to the Court, by affidavits, the Court, on motion of the prisoners' counsel, *quashed* the indictment, as having been irregularly found. It was there also ruled, that one not being

of the religious sect, usually called *Quakers*, though having conscientious scruples against taking an oath, could not give evidence on *affirmation*, but would be committed until he consent to take the usual oath.

In reference to the case last reviewed, it will be observed, that it furnishes no principles inconsistent with those previously advanced; it does not question the competency of any member of the grand jury, or sanction the plea in abatement for any such exception. The Court only proceed, in a manner analogous to setting aside verdicts of petit juries, to quash or avoid an indictment for the improper or illegal conduct of the grand jury in finding it, not upon evidence of sworn witnesses, but upon declarations without the sanction of an oath. This would, doubtless, have been a sufficient ground for a new trial after verdict, if not sooner discovered.

Other cases have occurred in Massachusetts, on which the prisoners' counsel place more reliance. In *Commonwealth vs. Parker & al.*—after a conviction ^{2 Pickering.} was had for murder, a motion was made in arrest of judgment, on the ground that J. Wythe, one of the grand jury, was not properly on the grand inquest, because the return of the *venire* for the town of his residence, was not signed by any officer: whereupon, the Court permitted the constable, whose duty it was, and who had neglected it, (he being present, and still in office) to amend the return, by signing it—then considered the matter.

The prisoners' counsel relied upon the doctrine of *Hawkins*, in reference to the statute of 11 Henry IV, which I have already quoted: also, on a case of *The Commonwealth vs. Davis* in MS. drawn up by Dana, and certified by the Chief Justice of the Common Pleas, who was of counsel in the case. The facts of this latter case appeared to be, that Davis was con-

victed, in 1794, of *burglary*, and after verdict, it was discovered that one Locke, who served on the grand inquest had not been chosen as a member, but that the name of one Burr, who had been chosen, had been erased from the return of the *venire*, and Lock's name inserted in its place. Upon a motion in arrest of judgment, it was contended, on the part of the government, that as there were seventeen jurors besides Lock, the indictment was good; to which it was answered, and so considered by the Court, that there might have been only eleven without him, who agreed to the bill, and that the judgment was therefore arrested.

The Court, in deciding the case of *Parker et al.* on the objection to Wythe as a juror, observed, that the precedents in which such an objection has prevailed, have generally been, cases where the juror was not qualified to serve. Then, noticing the statute of Henry IV, and *Hawkins'* reference to it, the Court proceeds to say, "The mischief was, that persons were put on the jury who were not qualified to serve—they were outlawed, &c. and had no right to be on the jury. The case referred to, of *The Commonwealth vs. Davis*, proceeds on this same principle," &c. But, "the present case is very different. Here, there was no objection to the qualifications of the juror. He was entitled to be drawn as a grand juror, and he was drawn, and had notice and attended, and was sworn and allowed to act with the grand jury." This opinion further remarks—"It is objected, that there is a difference between traverse jurors and grand jurors, because traverse jurors may be challenged. The books say, that grand jurors may also be challenged. But, there is a difficulty in the case, for a bill may be found against a person who has not been recognised, and who has no opportunity to challenge.

The case of *The Commonwealth v. Smith*—if we should adopt the remarks there made on this subject, to their full extent, would put an end to this motion in arrest," &c. In as much, however, as the doctrine of *Smith's* case, on this point, was not necessary to be applied, and the case in which it was expressed, was determined on another point; and because the Court had some doubts of its correctness in all cases, they decided *Parker's* case on the ground that Wythe was properly qualified to serve on the grand jury; and that the constable was properly allowed to amend his return. -9 Mass. Rep. 107.

It may be remarked, with respect to the case of *Davis*, (admitting it to be correctly reported,) that it, in no degree, conflicts with the principles I have maintained. *Lock*, whose name was foisted into the return, having never been chosen on the grand jury, surely could not, in fact, or legal contemplation, have the slightest claim to the character of a good and lawful juror, but the return of the *venire*, in reference to him, had been grossly falsified, and of course vitiated.

Parker's case is entitled to little, if any more, consideration. The juror's authority to serve, was deemed sufficient, on objection merely, that he, did not appear from the *venire*, to have been summoned. It is true the Court intimated, a doubt of the correctness of the remarks in *Smith's* case, but decided nothing in reference to this question; nor do they appear to have investigated the subject, to have considered the effect of the English statutes, to which I have referred, or the influence due to statutory *reforms* or *purgations* of jury panels, such as provided in England, or in this or any other State of the Union. I consider the law sufficiently settled to exclude the right to except to the personal qualifications of the persons selected, summoned and sworn on the grand jury, as prescribed by statute, after indictment found, and to

bind us so to declare it, whether we approve of the policy or not. But, to examine the question on principle, the impolicy of allowing the pleas in question, appears to me obvious. It must be conceded, that if the right exists, it must apply in all cases, as well for misdemeanors and inferior felonies, as for capital crimes. If a knowledge of the intended prosecution, by the accused, or his presence in Court, be held necessary to exclude the right, as contended in argument, this is more common and more generally to be expected in capital crimes than in charges for inferior offences. If *alienage* furnishes a ground for avoiding an indictment, it would seem that want of age, want of house-hold or free-hold, must do the same; then various other disqualifications must stand on the same principle, requiring the trial of distinct issues on evidence, the necessity of which could not be anticipated. The same consequences must result from various grounds of exemptions from serving on juries, or the latter must be distinguished from the former, and in some cases the distinction would involve much difficulty. But the consideration, that want of the strict legal qualifications in one or more of the grand jury, has no necessary tendency to prejudice the accused; that it can create no presumption that one expecting to be indicted, would choose to exclude such person from the jury, if present with the knowledge of the objection, inclines me strongly against the policy of allowing such defence. I would cheerfully submit to all the delay and embarrassment, that could arise from such a course of practice, if demanded by motives of true humanity or justice. Our juries being selected by, and in the presence of the several sworn officers of the county, as already shewn—all presumed impartial, and intended to pass on all bills preferred during the term of the Court, there can

scarcely be a motive or danger of oppression. The objections, generally, that would be available in one case, would be the same in all : many indictments may be found by a panel, containing, among others unexceptionable, one or two men wanting the requisite qualifications ; most or all the persons indicted, may have known this, or have had every opportunity to know it—all remain indifferent or silent : afterwards, perhaps at a subsequent term, after the statute of limitations has barred the commencement of new prosecutions, (in cases subject to limitation) one concludes he can derive some advantage (delay at least) by abating the indictment against himself—he succeeds—others follow the example, and every indictment is quashed, on a ground that could do injustice to no one, and would never have been claimed, but with a hope to delay or defeat the objects of the law. If finding an indictment could operate as a *conviction*, I would be more disposed to demand of the Court and its officers, all vigilance in scrutinizing the jury, and none from the accused : but, in as much as indictments, when found, are but legal *accusations*, intended to shield individuals from frivolous or malicious prosecutions, and to subject them to trial, only on strong presumption of guilt—as, afterwards, they are secured in the right to an impartial public trial before the Court, and by a jury strictly scrutinised—entitled to be confronted by the witnesses against them, with the full benefit of all witnesses in their favor, and of counsel in their defence—I cannot apprehend danger of oppression from grand juries, constituted as ours are required to be.

The admitted privilege of any and all persons, to challenge incompetent jurors, at any time before indictment found, is sufficient to prevent all material abuses of this kind. If, however, the indictment be

* 2 Gallison,
354.

* Dana's MS.
See page 131
of this volume.

not predicated on *evidence*, as in *Coolidge's*^a case ; or, if it be falsified by a change of the selected jurors, or the fraudulent insertion in the return of the *venire*, of an improper name, as in *Davis's*^b case, then the question is essentially different : it is not an *indictment* as prescribed by law, and of course should be subject to avoidance on plea, or motion properly sustained.

It would certainly involve great inconsistency, to maintain, that the circumstance of a grand juror having been an *alien*, should be adjudged sufficient to avoid an indictment after found, when, if one equally objectionable, serve on a petit jury, which returns a final conviction in either a civil or criminal case, (the fact being unknown until after the trial,) the verdict can not, for this cause, be disturbed. The latter, I understand to be the true principle in either case ; that such objection can only be made by challenging the juror before the trial.—(See *Hollingsworth vs.*

*4 Dallas 352. *Duane.*')

Notwithstanding we have neither the information of facts in evidence, or any legal authority to investigate the *guilt* or *innocence* of the prisoner ; but only to determine the isolated questions of law, reserved by the record for our revision, it is ever extremely painful to decide against the accused, on a question *vitally* affecting him ; but Judges can exercise no mercy or discretion, beyond their opinion of the law.

In the opinion of a majority of the Court, the *judgment must be affirmed.*

By Mr. Justice THORNTON.

The question which has been referred to this Court, by the Judge who tried the prisoner, is simply this : can he, after the indictment has been found, returned into Court, accepted and filed, plead in bar, or

avoidance of that indictment, that one or more, of the grand inquest of the county, who preferred it, is an alien, or labors under any other, of the various disqualifying objections, which affect the competency of a grand juror. I think he can not, either upon principle or precedent.

The first case in which we find any attempt was made to plead such matter, is referred to by *Hawkins*,^a as in the Year Book of 11th Henry IV, when it was disallowed; and that author says, it is the better opinion, that those decisions, after that referred to, in which such plea was allowed, were made under the statute of Henry IV, which expressly declared the indictment thus found to be null and void, and of no effect. The argument to sustain the plea of such matter, is, that upon common law principles, alienage, &c. disqualifies a juror. Now, this is equally true of the alien, &c. whether he be a grand juror, or a petit juror; and if the finding of a bill by such an one makes the indictment void, by parity of reason, the finding of a verdict by such an one, would also be null and void. Yet it is well settled, that in such case, the verdict can not for that cause, be impugned. The principle which governs in both instances in this country, where we have no statute like 11th Henry IV, is, that the tribunal to decide on the matter must be challenged before it performs the function, for which it was constituted. The office of a grand jury is to prefer the charge, and that of the petit jury is to try it. After the action of either is completed, their competency to act, is not questionable. The action of the grand jury terminates with the filing of the bill—that of the petit jury, with the rendition of the verdict. So far as the safety of the citizen is involved, it cannot be pretended, that it is less important to overhaul the verdict, than

^aBook 2, c. 25,
sec. 18.

to set aside the finding of the indictment: for the latter only prefers an accusation, whilst upon the other, depend emphatically, the issues of life and death. The only reason for any distinction in the two cases, which can be urged with any degree of plausibility, is, that in the case of the petit jury, the party has a *better* opportunity of challenging, than in the other. In both cases, all the books agree, that there is a full and fair opportunity to do so, which was practically illustrated in the trial of Burr. The interest which is felt in the case of the grand jury, is not commonly so incentive as to induce its exercise, and hence it is rarely done: but that does not vary the essential nature of the case. This principle, which relates only to the *competency* of the body, whether grand, or petit jury, should not be confounded with another, which relates to the *competency* of the *testimony*, upon which the action of the body is founded. In the latter case, the doctrine is, that where the evidence is incompetent, the action had upon it, is a nullity, and may be availed in the appropriate mode peculiar to each. In the case of a verdict found, by a motion for a new trial addressed to the Court, and in case of indictment returned a true bill, by appealing to the same tribunal, either by motion, or by plea, according to the practice of the Court.

The decision of this Court, now pronounced, adverse to the allowance of the pleas of alienage, &c. after indictment filed, I apprehend to be, the doctrine of the common law, which, both in civil and criminal matters, is in full force in this state, so far as not incompatible with the genius of our political institutions, unless altered by statutory enactment of our own legislature. The application of the principle, is, I think, entirely obligatory upon us, and if it be unwholesome, which I am far from conceding, the ap-

propriate remedy is to be applied by another department of the government. I would venture to predict, that a statute conferring the benefit of pleas, of the character refused in the Court below, upon prisoners; whilst the correct organization of our grand jury, is secured by so many guards, as our present laws afford, would result rather in the obstruction of condign punishment, than in the protection of persecuted innocence.

I concur in the affirmance of the judgment, with the *Chief Justice*.

Mr. Justice HITCHCOCK, dissented.

I am not able to concur in the opinions just delivered. I think the plea of alienage should have been allowed, and that too, notwithstanding the plea of *misnomer*.

That plea should not, I think, have been received. It is not a good plea at Common Law, in a case of felony; because the proceeding in such case is against the person of the prisoner, by whatever name he may be distinguished.* We have no statute, as in Eng-^{3 Bacon's In.} land, allowing it, and a middle name, or the initials of ^{G. 2.} one, cannot be pleaded in abatement, even in a civil case.^{5 Johns. 84.} This being the case, I would not, in a capital case, deprive the party of a second legitimate plea in abatement, though the first immaterial one had been allowed by the Court below, and had been found against him.

By our statute, a "grand jury of a competent number of *good and lawful men*, of the county where the Court is held, shall be returned and empannelled agreeably to law, to attend each term of the Circuit Court." By the Common Law, these "*good and lawful men*," must be citizens: they must not be "*aliens, villeins, outlaws, either in criminal or perso-*

nal actions ; persons attainted of treason or felony ; or persons convicted of any species of *crimen falsi*, as conspiracy, or perjury, which may render them infamous,* and any person returned on a jury obnoxious to any one of these objections, may and will, at the suggestion of any person, before bill found, be rejected.^b

* 1 Chitty's Cr. Law, 207.—³ Bacon's, Abr. 725.

^b 3 Bac. Abr. 725.

This right, so far, it is admitted, exists at Common Law, and *Chitty*^c says, it may also be done after bill found, by plea in avoidance ; and he refers to *Hawkins*,^d who states, that it is doubtful whether this right exists at Common Law or by the statute of 11 Henry IV, chap. 9. He refers also to *Bacon, Juries A.* But, he says, *the exceptions must be taken before indictment found.*

^c 1 Cr. L. 207.
^d Hawk. book 2 ch. 25, § 18.

This statute, after reciting that inquests had been taken at *Westminster*, by persons not returned by the sheriff ; by persons outlawed ; by persons who had fled to sanctuary for treason and felony, declares that all such indictments so made shall be null and void, and for nothing held. This statute does not embrace aliens, and no case can be found in England, where the question has been made. It could not, of course, arise on any one of the other qualifications since the statute, and we are left to decide the question, more upon principle than authority.

The case of the *Shearers*, alluded to, shews, that the Judge there had his doubts, as well as *Hawkins*. The only case to be found, of a decided opinion, is that in 9 *Mass. R.* This was a *dictum* of Justice *Sewall*, and the reason, to wit, that to allow the plea would contradict the averment in the indictment, that "*the jurors were good and lawful men*," does not seem to be entitled to much weight. Its correctness was questioned by the Court in a case in 2d *Pickering*.

In England, by the statute of the 3d Henry VIII,

the justices reform the panel returned by the sheriff, by putting off such as are disqualified, and adding others in their place. It has, however, been decided, that this act does not repeal the act of the 11th Henry IV, where it does not conflict with it, and therefore, an indictment found by an outlaw, or person returned at the instance of any person, (except of the justices) may still be abated on plea as before the statute: neither statute authorises the plea; it is allowed to carry into effect the provisions of the statute which declares the indictment void.

It is true, our laws regulating the formation and selection of juries, is more guarded than in England. It requires, every two years, a list of free-holders and house-holders to be returned by the sheriff to the circuit court clerk, which are placed in a box, and the panel is drawn from this box by the sheriff and clerk, and if it appear that a person, whose name is drawn, has removed from the county, or is deceased, his name shall not be included in the panel, but no other power is given to reform the panel: aliens and felons may be there, and may be returned. In this particular, the power does not extend as far as it does in England.

Is our law then, so guarded that no objections ought to be allowed after bill found? If, indeed, the presumption is, that the law has taken sufficient care of the interests of those who may be indicted, (and every man in the community is liable to be,) why is an exception to be allowed before bill found? Yet it is clear, that any one of the objections known to the Common Law, may be made by any person as *amicus curiæ*, before bill found, and the person objected to will be discharged.

If the plea is not allowed, this consequence follows, that a person, before bill found, may, upon sugges-

tion, purge the jury, as long as he can find upon it persons disqualified ; but after he is indicted, even though it be for a capital offence, he can alledge nothing against the panel, though every person on it may be, in fact, disqualified. Does this seem reasonable or just.

In England, by statute, a person who procures himself put upon a jury, or who has been put on at the request of another person, will make the bill void, though he may be qualified in other respects, and though there may have been a competent number of persons beside him on the jury; who were qualified, and who concurred in finding the bill.* Is not the principle of the objection, to be found in the Common Law, and does it not exist properly then, without the statute.

*3 Bacon's Ab.
727.

The distinction taken, as to the time when an exception can be made, precluding it after an *action* by the grand jury, and the analogy which is attempted to be drawn between this case, and that of exceptions to the petit jury, which are not allowed after verdict, does not hold. The analogy fails when the reason fails. In the case of the grand jury, the defendant has never been called to except, until bill found. In the case of the petit jury, he has had his day for objection and selection. There must be an end to the prosecution ; and when the party has had his day of objection, he must submit.

The true and safest rule, to my mind, is this, that when a bill has been found by persons who, by the *Common Law*, are *disqualified*, it should be held void upon plea, and the defendant should not be held to answer an indictment proceeding from so vicious a source. By adopting the other rule, the act is made to sanctify the means, and the party loses his right to object, for not having done so before he

had a motive, and on being arrested, though he can shew that the accusation has proceeded from aliens, felons, and persons packed upon the jury by fraud, he is told that he is too late—the accusation has purified the accusers, and he cannot be heard.

Even in a civil proceeding, a person is permitted to except to the illegality of a proceeding, until he waives the right; much more then should this right be held sacred in a criminal case, where it is said a man cannot waive his rights.

But, public policy and convenience, it is said, forbid this proceeding. What principle of public policy can be more sacred than that the sources of justice should be pure? and wherein is the inconvenience greater after bill found, than before? A bill is found to-day—the defendant is put upon his trial to-morrow—he can alledge nothing against the grand jury, when the next entry on the minutes may be an order discharging the same jury, at the suggestion of any idle bye-stander who may chance to come into Court, and against whom no charge is made. Ought not the Court rather to say, that indictments found by persons not “good and lawful men,” shall be “revoked, annulled, void, and holden for none forever.” If I am to be put on trial for my life, let my accusers, at least, be *boni et legales homines*.

The want of authorities in favor of the plea, is suggested as an argument against it. I infer the opposite. There are cases so plain, that precedents can not be found shewing their having been contested. The point could not be made in an appellate Court, unless, as in this case, the plea was denied. It is hardly possible that a case never occurred, but it is possible—may be quite probable, that the plea was never before denied.

Indictments have been quashed, and *nolle prosequi*

qui's have been entered for irregularities, much less than this.

In 2d *Mason*, Judge *Story* quashed an indictment because it appeared on *trial*, that a man had given evidence before a grand jury, who had (though not a Quaker,) been affirmed, he having conscientious scruples against taking an oath.

In 2d *Pickering*, a bill was quashed, because found by a person, one of the grand jury, who had been substituted for one of the regular panel, as a matter of convenience to the regular juror; and I presume hundreds of cases have occurred where the prosecuting officers have entered *nolle prosequi's*, on suggestions of irregularities, not even affecting the jury. Hence the want of decided cases to avail us in the investigation. The inconvenience is trifling—it is preferred even in pleas of *misnomer*. A new bill can be found. If necessary, the jury can be reformed, and the proceedings can be had without a suggestion of a defect.

By this course, and by always listening to any suggestions which will shew, that the grand jury must always be not only pure, but above suspicion, you remove the temptation to corruption, and keep it, what it was always intended to be, the grand inquest of the county, composed of "good and lawful men—as ready to reject unfounded charges, affecting the life, liberty, and character of the citizen, as it will be to detect crime, whenever it exists. Let the sources from whence justice emanate, be always pure, and the law can look crime in the face, and punish it without a blush. I cannot imagine, that a rule which, for all practical purposes, has been exploded in England, since the time of Henry IV, and when it is doubtful whether it ever existed at the Common Law, is fit to be applied under the liberal and enlightened policy of the present age.

CALLISON, et al. *versus* LEMONS.

In an action of trespass, assault and battery, against several, the jury, upon executing a writ of inquiry, must find a joint verdict against all the defendants, and cannot assess separate damages.

A plea being double, (provided it contains any one substantial defence,) is not a defect of substance; but is a redundancy which, whether of good or bad matter, will not vitiate.

Objection to the time of filing a plea, is waived by a demurrer thereto.

A plea, to an action of trespass, assault and battery, *that the assault and battery were committed beyond the jurisdiction of the Court*, is not available.

A plea, alleging *that the defendants were served with process out of the county of B*, in the Cherokee nation, held bad, without the further averment, *that the defendants were not residents of the county of B*—as by the act of 1818, process was authorised to be served in Indian lands, upon any one, *resident* of the county, from which issued.

Lemons commenced an action of trespass, assault and battery in the Circuit Court of Blount, against the plaintiffs in error. Fields, one of the defendants below, filed a plea in abatement, averring, that he was not resident of the county of Blount, but of the Cherokee nation, out of the limits of said county, where process was executed upon him. The other defendants joined in a plea of like character, but which only alleged that the assault and battery were committed out of the jurisdiction of the Court, and that the process was served out of the county of Blount.

The Court below, sustained a demurrer to all the pleas, and no further plea being offered, a judgment by default was taken against the defendants.

On executing a writ of inquiry, the Court instructed the jury to render a joint verdict against all the defendants, which was done accordingly.

A writ of error being taken here, it was insisted,

1st. That the Court erred in its instructions to the jury, to render a joint verdict against the defendants.

2d. That the Court erred in sustaining a demurrer to the pleas in abatement.

PECK, for Plaintiff—cited *Ala. Rep.* 380—1 *Lord Raymond*, 509—*Comyn's Dig. Pleader*.

ORMOND, *contra*.—1 *Stewt.* 521—5 *Bur.* 2792.

By Mr. Justice THORNTON:

This was an action of trespass, assault and battery, brought against the plaintiffs in error, by the defendant, in the Circuit Court of Blount county. The plaintiffs severed in their pleas: Fields, one of them, pleading alone in abatement; and the others uniting in a similar defence. A demurrer was taken, and sustained to both of those pleas, and the plaintiffs in error failing to plead over, a judgment by default was entered against them, and an inquiry of damages had by the jury, and judgment of the Court thereon.

The cause is here by writ of error, and the assignment questions the legality of the judgment sustaining the demurrer; as also a charge of the Court to the jury, whilst executing the writ of enquiry. As to this last point, there can be no doubt that the charge of the Court, which was, that the jury must find a joint verdict against all the defendants, and could not assess separate damages, was entirely correct.

I will proceed then to consider the other error assigned, which involves the validity of the two pleas in abatement. The plea of the defendant Fields, I think, is substantially a good one. The objection to it, for the time of filing it, was waived by the demurrer: and its alleged duplicity, is a defect not now available, because of our statute of *jeofails*, which gives to all demurrers the effect only of general demurrers; and the plea being double, provided it contain any one substantial defence, is not a defect of

substance; but is a redundancy, which, whether it be of good matter, or bad, does not vitiate. *Utile, per inutile non vitiatur*. This plea contains, though blended with other matters, these positive averments, viz: That the defendant at the impetration of the writ, was not a resident of the county of Blount, but of the Cherokee nation, out of the limits of the said county, and out of the jurisdiction of the Court; and that the said writ of *capias ad respondendum* was executed upon him, without the limits of the said county, and of the jurisdiction of the Court. Now, the demurrer which admits these facts, can only be sustained by affirming the proposition, that a defendant can be sued by a process from the court of a county in which he does not reside, and be arrested in virtue of said process, by the sheriff of that county, beyond its limits, and beyond the limits of the jurisdiction of the Court, of which he is the ministerial officer. This, I apprehend, cannot be maintained; so, without considering the other matters embraced in this plea, we conclude, that it was good, and of course, that there was error in the decision of the Court, adverse to it.

With regard to the plea of the other defendants, I think the demurrer was properly sustained. It discloses no facts which authorise the conclusion, that the service of the process, which it seeks to abate, was not lawful. The plea contains but two distinct facts;—first, that the assault and battery complained of, was committed out of the jurisdiction of the Court; which, this being a transitory action, is wholly immaterial, either in bar, or abatement; and secondly, that the process was served out of the county of Blount, in the Cherokee nation. Now, this latter fact, does not prove the service to be bad; without the additional averment, that the defendants were not residents of the county of Blount; for, by the act of 1818,* pro-

*Aik. Dig. 379,
§ 115.

cess was authorised to be served in the Indian lands, upon any resident of the county from which the writ was issued.

The judgment must be reversed, and the cause remanded.

M'ELYEA *versus* HAYTER.

The act of Congress of 29th May, 1830, granting pre-emptions to settlers on public lands, having expressly inhibited all assignments and transfers of the right of pre-emption, prior to the issuance of the patent; a power, executed with authority to convey land entered under that act, when the patent should issue, was held to be but a circuitous evasion of the act of Congress, and consequently, void, and that a title obtained under such power, was illegal and inoperative.

Seemle—that the principle would not necessarily be the same, if, a bond, conditioned to make titles to the land, had been executed, and ratified by an execution of the conveyance, after the patent had issued; the latter would have constituted a new contract—although the penalty of the bond itself, or damages for its breach, might not have been recoverable.

This was an action of trespass, to try title, brought by Hayter, in the Circuit Court of Jackson. The land in controversy, had been entered by McElyea, under a pre-emption law of Congress, passed on the 29th May, 1830. Previous to the issuance of the patent to McElyea, he executed a power of attorney to one Campbell, authorising him to convey the land to Hayter, when the patent should issue. Campbell, in pursuance of the power, executed the conveyance for the land, and this action was brought to recover possession. McElyea offered, on the trial below, to show, that he had verbally revoked the power to Campbell: the Court, however, rejected testimony of this fact, and a judgment was rendered in favor of Hayter.

This case was brought here, by bill of exceptions.

McCLUNG and SHORTRIDGE, for Plaintiff—

Contended, that there was no such contract as would entitle the plaintiff below, to an action to try title. The case is a very plain one. Can it be pretended, that to bring this case within the act of Congress, we are to spell out, and show by word and letter, that the paper was a transfer? Surely not. If the law has any meaning, we must be governed by its intent, its reason and spirit, This action is in the nature of an action of ejectment. In that action it is a well known principle, that the plaintiff must recover on the strength of his own title, and not on the weakness of that of his adversary. This principle applies here. The plaintiff must show a clear chain of title, valid and legal in every part, or he cannot recover. Here, there is a part of the chain of title that is broken. Campbell could confer no title but what he had received. He had received no transfer of title; or whatever pretended title he had, it was received at a time when no transfer whatever was permitted by law. If there was no legal transfer then, there was nothing which could be carried out and perfected afterwards. But, it is said, that if the person entitled to pre-emption, had given a bond for title, a deed of conveyance given in pursuance of such bond, would have been good; and it is contended, that that is a similar case to this—that the title made by the agent, authorised by power of a torney, is as good as if made by the party himself. We say no: There, there would have been consent; here, there was no consent, but the deed was made against the consent of the party entitled to pre-emption. Can an act which conferred nothing, become something afterwards by a subsequent event, the patentee objecting all the while? All presumption of subsequent assent, is rebutted by the fact, that the patentee op-

posed the deed of assignment. Congress, in prohibiting a transfer, intended to prohibit any and every means of passing the title. There could be no fiction which would authorise a title to be passed from one, whom the law had said should not be permitted to part with it. This would be but a subterfuge to evade the law. There are fictions of law permitted; such are those in ejectment, and in fine and recovery; but they are permitted only to support, and not to overturn the great principles of law. But to allow the imaginary fictitious state of the title here supposed, would be to overthrow the grand object which Congress had in view.

Suppose both parties to have been equally culpable in attempting this mode, to make a sale interdicted by law, who stands in the best situation? Certainly, the possessor. *In pari delicto melior est conditio possidentis.*

If this land had been given up in pursuance of the deed, the case might have been different; but the defendant below being in possession, the plaintiff had clearly no right to recover.

S. PARSONS, *contra*.—The act of Congress which declares void all transfers and assignments made prior to the issuing of the patent, is in restraint of freedom of alienation. It should, therefore, be construed with strictness. Let it be so construed, and it cannot extend to this case. The power of attorney was not a transfer; no transfer was made until after the issuance of the patent. If the party entitled to the pre-emption had given a bond before the issuance of the patent, and a deed afterwards, in pursuance of that bond, whatever might be said of the bond, the deed would surely be good. That case is, in principle, like the present. Here, the conveyance was made by

one having received authority to convey; it is the same as if the conveyance had been made by the party himself.

By Mr. Chief-Justice SAFFOLD :

The action is trespass, to try titles. The suit was instituted in the Circuit Court of Jackson, by Hayter, against the plaintiff in error, to recover possession of a half quarter section of land, in the district of land subject to sale at Huntsville: also, damages for the detention. A recovery was had in favor of the plaintiff below, according to the object of the suit. On the trial McElyea excepted to the evidence offered against him, but his objections were overruled, and the evidence was admitted.

This is the cause now assigned for error.

It appears that the land in question was entered by McElyea, under the act of Congress, passed on the 29th May, 1830, entitled "An act to grant pre-emption rights to settlers on the public lands;" that the patent issued to him on the 1st of June, 1831, in the usual form. It also appears in evidence that previous to the latter date, in September, 1830, McElyea had executed his power of attorney to one William H. Campbell, authorising him in the name of the principal, to execute a deed of conveyance to Hayter for the land in question, so soon as the patent should be obtained for the same. The evidence discloses the further fact, that subsequent to the date of the patent, in June 1832, the deed of conveyance was executed pursuant to the power. It is also shewn, that McElyea offered proof on the trial, that previous to the execution of the deed he verbally revoked the power of attorney, forbidding Campbell to execute the conveyance; which proof the Court rejected. All these documents appear to have been legally executed and recorded ;

except so far as relates to the capacity of the parties to contract concerning the subject matter, at the time of contracting.

The act of Congress referred to, under which this entry was made, after granting the right, and prescribing the mode by which the settlers could avail themselves of its provisions, declares "that all *assignments and transfers* of the right of pre-emption, given by this act, prior to the issuance of the patents, *shall be null and void*." This inhibition is peremptory in its terms. The policy of the restriction, unquestionably was to protect the objects of the statute from the imposition or oppression of speculators or capitalists. The circumstances which alone could confer this right of pre-emption on the settlers, their occupancy and cultivation of the public lands, pre-supposed them to have been indigent, and within the grasp of money holders. The right was about to be vested, without any previous negotiation on the part of those who were intended to be benefited by it, when it might well have been apprehended, as doubtless it was, that many, in remote parts of the Union, would for some time remain ignorant of their rights, or of the requisites to establish them; and would not therefore duly appreciate them. The presumption also was well warranted, that many might, previous to the passage of the act, have assigned or transferred the right, while it remained merely in expectancy; and that by these means, the actual settlers might be deprived of the intended bounty. Hence it was, that the government, while granting the right of pre-emption, absolutely interdicted the assignment and transfer of it, prior to the issuance of the patent, by declaring all such assignments and transfers "*null and void*."

Now, does not the power of attorney clearly imply a contract, assigning and transferring the right of pre-

emption in this case, at the time of its execution, which was long prior to the issuance of the patent? It was also previous to an act of 1832, supplementary to the former act, which removed the restraint, by providing that *after that time*, all persons who had availed themselves of the right of pre-emption under the former act, might assign and transfer their certificates of purchase or final receipts; and that the patents might issue for the lands in the name of such assignee. At the date of this latter act, Congress appears to have acted on the presumption, that the danger of injustice or oppression contemplated by the former, had ceased; that sufficient time had elapsed for all persons entitled to pre-emptions to have become informed of their rights, and to have placed them beyond the reach of injurious speculation. It is perfectly clear that one holding a certificate, or final receipt, for a pre-emption right of this description, under a transfer or assignment, executed prior to the date of the latter act of Congress, could not have obtained the patent in his own name—that he would not, by law, have been entitled to it.

Had this been only a power constituting Campbell the general agent of McElyea, to transact his business in his absence; and among other things, to convey and assign, or transfer his lands, such instrument would not have furnished internal evidence of a prior contract for the assignment or transfer of any particular article. But, in this case, the object is special and definite—that Campbell should, for McElyea, and in his name, alien and confirm by deed, to Hayter individually, this particular tract of land; from which, the inference is irresistible, that a contract then existed for the “assignment and transfer” of the same, between these persons, such as the act of

Congress had declared should be *null and void*. The principle is not necessarily the same, as, if instead of this power, a bond for titles had been executed at the same time, and McElyea had afterwards, when in possession of the patent, executed the deed pursuant to the previous void agreement. In this latter case, the subsequent execution of the conveyance would have constituted a new contract, when there was no restriction against it. But if suit were brought on such bond to recover the penalty, or damages, for the breach, it is clear that no such recovery could be had, because of the illegality of the contract, with reference to the subject matter, at the time when made. Though it is true, McElyea could have legally revoked this power, or he could have adopted and sanctioned it, after being authorised to alien the land; it does not appear that he did either; and viewing it as a void or voidable instrument, he is not concluded by it, unless it can be inferred, that he afterwards adopted and ratified it; of which, however, there is no evidence; on the contrary, it appears, he offered evidence of a verbal *revocation*, which the Court rejected. I do not mean to say, that a parol revocation could avoid a valid power, executed by deed; but as this power was insufficient without a subsequent approval, adoption, or ratification, we are fully authorized to assume the fact, from the rejection of this evidence, and the absence of any other, that there was none such.

•11Wheat.258

The case of *Armstrong vs. Toler*,* is an authority on the principle involved in this case. It was there held, that where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it; also, that if a contract be, in part only, connected with the illegal consideration, and *grows immediately*

out of it, though it be in fact a new contract, it is equally tainted by it.

Here it is fully evident, that the circuitous mode adopted to effect this assignment and transfer, was intended as an evasion of the prohibitory act of Congress ; therefore, the title thus acquired, must be pronounced *null and void* ; and, the judgment below must be reversed, and the cause remanded, if desired by the plaintiff below.

TURK versus SMITH & CO.

The judgment of an inferior Court, on a matter submitted for its inspection, will not be reviewed, unless a bill of exceptions, making that matter part of the case, and bringing it to the view of the appellate Court, has been regularly taken.

In the Circuit Court of Jackson, a proceeding by *scire facias* against bail, was instituted by Smith & Co. against the plaintiff in error, Turk.

The plea was *nul tiel record*—on which, after an examination of the record, in the original judgment, the Court below, decided in favor of its sufficiency, and judgment was regularly entered for the plaintiffs below.

The defendant, by writ of error, brought the case into this Court, alleging a variance between the *scire facias*, and the record of judgment on which the *scire facias* was founded : but no bill of exceptions to the judgment of the Court below was taken, either setting out the record, or showing its imperfections and variance.

S. PARSONS, for Plaintiffs.

HOPKINS, *contra*—*Ala. Rep.* 289—*Aik. Dig.* 51, § 8—52, § 12—53, § 16.

By Mr. Justice HITCHCOCK :

This is a judgment on a *scire facias*, against bail. The defendant cravedoyer of the bail bond; and pleaded *nul tiel record*, and that the bond is "not such as is required by law." Judgment was rendered in the Circuit Court of Jackson county, for the plaintiffs below, and the case has been brought here by writ of error.

Various assignments have been made here, to show a variance between the *sci. fa.* and the record of the judgment in the original suit, upon which the *sci. fa.* is predicated—none of which can be noticed, as that record is not before this Court. On the plea of *nul tiel record*, the Judge below inspects the record, and gives judgment as to him may seem right; and to bring any question upon his judgment here, there must be a bill of exceptions, to make the record a part of the proceedings of the case. That not having been done, the Court here, cannot look at that record.

The second plea, as to the sufficiency of the bond, can, if viewed at all, be considered only in the light of a demurrer to the bond. The Court has looked into it with that view.

Our statute requires the sheriff, in all cases requiring bail, to take a bond in double the amount of the debt sued for, payable to himself, which he is required to assign to the plaintiff. There is no form required by statute, but all bail is declared to be special bail, and is to be proceeded against by *sci. fa.* after a return of, the *body not found*, on a *capias*.

This bond describes the suit, and sets out a condition, substantially shewing what the defendant would

be liable for—which is, for the appearance of the defendant in the original suit, at the return term of the writ, “there to do what may be by law required of him, and not to depart the Court without the leave of the Court—if so, to be void, and not else.”

The Court can discover no defect in this bond; and the judgment must be affirmed.

WYATT *versus* AYRES AND TARRANT.

Where one falsely and fraudulently representing himself to be the agent of others, prosecuted a variety of legal proceedings against A and T, and thereby induced them to execute their note, as a compromise,—held,

That this was the case of a fraud, growing directly out of an immoral act, connected with, and depending upon it: and that a plea, alleging these facts, was a good and available defence to an action, brought to recover the amount of the note.

This was an action of debt, brought in the name of Wyatt, against the defendants, in the Circuit Court of Jefferson.

The defendants filed their plea, setting out, in substance, that one Thompson, had artfully induced the defendants to execute the note sued on, as a compromise of certain motions which he was prosecuting against them, by falsely and fraudulently representing himself to be the agent of the plaintiffs in those motions.

A demurrer to the plea, was overruled by the Court below, and that decision was assigned to this Court as error.

PECK for Plaintiff.—Do not the matters set forth in the plea, disclose a sufficient consideration to support the note? If it be contended that the compromise

of the motions was the inducement to the giving of the note, then, whether Thompson was or not, the legal agent of the plaintiffs in those motions, is immaterial. The actual compromise, was a present benefit to the defendants, and therefore a consideration. *Powell on Con.* 346—*Ripon v. Norton, Cro, Eliz.* 881.

The plea does not charge that any fraud by Thompson induced them to make the note payable to the plaintiff. It says, Thompson *artfully* induced them, without disclosing what arts were used. In the first place, I deny that artfulness amounts to fraud: falsehood must enter into and form a component part of every fraud. A party may act artfully, or what is synonymous, skilfully, without suppressing the truth, or suggesting a falsehood. But, if it be determined that artfulness possesses all the evil qualities of a fraud, then, I contend, the artful conduct should have been specifically charged—that the Court might have determined whether it amounted to a fraud; and also, that the plaintiff might have traversed it by a replication.—*The Huntsville Bank v. Hill, 1 Stemt.* 218.

The plea does not aver that Thompson was, or pretended to be, acting as the agent of the plaintiff, Wyatt. The plaintiff is in no wise charged to have participated in the supposed fraud, or even to have had any knowledge of it. The fraud of a third person cannot be plead against the plaintiff, without connecting him either directly or indirectly, with its perpetration. The plea is to be taken most strongly in its construction, against the defendants. The plea, therefore, not charging the plaintiff with any participation in the fraud, the Court will pronounce him innocent.—*Chit. on Pl.* 521.

Again—The promise contained in the note is unconnected with the supposed fraud, practised by Thompson on the defendant: therefore, it is not taint-

ed by it. The making the note was a subsequent voluntary contract with the plaintiff, and distinct from the one with Thompson to compromise the motions. *Armstrong vs. Toler*, 11 *Wheat.* 258, 272, 273—*Tachney vs. Reynolds*, 4 *Burr.* 2069—3 *Term R.* 418.

By Mr. Justice HITCHCOCK :

This is an action brought on a note, under seal, dated 23d April, 1830, payable 25th December following, for one hundred dollars, given by the defendants, payable to the plaintiff. The defendants pleaded, that the writing obligatory sued on, was obtained from them by *covin*, collusion, and misrepresentation, by one James Thompson, in this—that the said James Thompson, before the making of the said instrument, had instituted and was prosecuting a variety of motions in Jefferson Circuit Court, against the defendants and their securities, who had been sheriffs of said county, for failing to return, according to law, a variety of executions, which had issued upon judgments in said Court, and which had been placed in their hands to execute and return, according to law. The plea sets out the motions, shewing a number of cases between different persons. It then states, “that the said Thompson, by falsely and fraudulently representing to the said Ayres, that he, the said Thompson, was the *lawful* agent of the said plaintiffs in said motions, and was duly authorised to institute the same, *falsely and fraudulently* induced the defendants, upon a compromise of said motions, to execute the said instrument, when in truth and in fact, the said Thompson, at the time of the institution of said motions, and at the time of the making of the said compromise, and the execution of the said instrument, was not the lawful agent of the plaintiffs in the motions, and had never received any authority from them to institute, prosecute, or

inferences to be drawn from it; and it is not conceived that it is obnoxious to any one of the positions which have been insisted on by the plaintiff's counsel.

The judgment must be affirmed.

NABORS *versus* NABORS.

While a mere entry or statement of the name of a case, and of the counsel prosecuting and defending it, not shewn by whom made, (not being such an entry of appearance as is required by the rules of Court,) or the giving of a replevy bond, (in an action of detinue,) or the filing of a plea in abatement to the writ; are not, in either case, such an appearance as will waive the right of an objection to an abateable defect in the writ: Yet, a plea to such defect, to be available, must appear to have been submitted at the proper time, in the proper place, and in the mode prescribed by the statute.

This action, being detinue, was instituted in the Circuit Court of Shelby, by the defendant in error, to recover possession of certain slaves.

An objection, by plea, was made to the writ, that it was returnable to a day in February, when, by law, it should have been to March. The Court below, rejected the plea, and a writ of error was taken to this Court, where the defect in the return of the writ, was insisted on, as error.

The record showed the statement of an entry of the title of the cause, the nature of the action, and the names of prosecuting and defending counsel. It also disclosed, that the defendant had replevied the slaves, and given the usual bond required in such cases.

MOODY and STEWART, for Plaintiff in error—Contended, that the writ was returnable to an improper day: it required the appearance of the party at a time when there was no Court. The question arises,

was the writ good? It required that, which there was no legal authority for requiring. No obedience to it would have been of any avail: it was, therefore, an unauthorised and illegal writ. But the defendant below, gave bond, according to law, that he might retain the possession of his property; and it may be said that this was a waiver of the error in the writ. He gave bond under coercion: he was bound to give bond. This, then, could be no waiver of any right; for a waiver must always be voluntary. It may also be contended, that the entry of the name of Mr. *Mardis* on the docket, as attorney for the defendant, was a waiver of the error. This was no appearance, in the legal sense of the term. The docket is no part of the record. A rule has been adopted by this Court, that a book shall be kept for entering appearances, in the Circuit Courts, and the attorney shall state for whom he appears, and the date of his appearance. No such appearance seems to have been entered in this case; and yet, if such appearance had been entered, it is not admitted that it would have been any waiver of the error in the writ. The party appears for his own defence—not on the merits, but against the illegal prosecution: he appears, not to enter into the question of property, but to shew that he has no right to be called on to answer under the circumstances of the case. Shall a party be entrapped by conformity to the rule?

At a subsequent term, a plea in abatement was offered, setting forth the error of the writ; but it was rejected by the Court. The offering of this plea cannot be a waiver of the required notice. An appearance to file such a plea as this, is no appearance to bind the party, otherwise no error of the kind now under consideration could ever be taken advantage of. The attempt to take advantage of it, would cure it.

But here the plea was not received, and ought not, in fact, to be in this record ; and not being received, it ought not to be used to prejudice the party.—2 *Stewart* 41.

PECK, *contra*—Insisted, that the plaintiff in error, was standing, in support of his rights, on a mere technicality. True, there is an error in the writ, as to the time of holding Court. It is a mere clerical misprision. The giving of the bond, by which the party had his property returned, was a sufficient waiver of the objection. And the entering of the party's name, by attorney on the docket, was a sufficient appearance to cure the defect. It shewed the defendant was apprised of the holding of the Court in due time—that he knew the proper term, and recognised it by his own act. If this were not sufficient, the plea in abatement would be. The appearance cures the clerical error. The object of the writ is to bring the defendant into Court ; and the offering of a plea shews that the object of the writ has been effected. The giving of the bond, entering of the attorney's name on the docket, and finally, the offering of the plea, all sufficiently shew, that the defendant knew of the suit, of the Court to which it was brought, of the nature of the action, and when and where he might appear to defend.

The clerk says, that at the May term, the following appearances were entered : “ *Nabors vs. Nabors. Peck*, for Plaintiff—*Mardis*, for defendant.” This is a substantial compliance with the rule : it is a literal compliance, except as to the day when the appearance was entered. Does not this record shew, that the party was present, and employed counsel ? The record shews, that these appearances were entered before the declaration was filed. If the defendant be-

low, had intended to treat such writ as a nullity, and had entered no appearance, the plaintiff would then, probably, have discontinued his action. Shall the defendant be allowed to entrap the plaintiff, by a defective appearance? If the appearance is defective, it is the party's own wrong, of which he cannot be allowed to take advantage.

As to the plea in abatement, it is not contended that a defendant cannot take advantage of a defect in the writ, without injuring his rights by appearance; but it is urged, that if he fail to succeed in such attempt, he is shewn to have been in Court, which amounts to an appearance. The filing of a plea in abatement is an appearance. Here, the defendant filed his plea; but it was not in time, and it was therefore rejected by the Court. He cannot then turn round, and say he is not in Court.

The law requires an endorsement of the cause of action on the writ; but the Court has decided, that no advantage can be taken of this defect, unless taken at the appearance term.—2 *Stent*. 130. This, like the case before the Court, is a defect in the writ. So, here, the defect should have been taken advantage of at the return term of the writ: the plea was offered at the trial term.—See 3 *Peters*, 459.

By Mr. Justice HITCHCOCK:

This is an action of detinue, brought by William Nabors, against the plaintiff in error, for two negro slaves. The writ was issued on the first day of November, 1830; and is made returnable on the "*fifth Monday after the fourth Monday in February*," then next, when it should have been, *fifth Monday after the fourth Monday in March then next*. The negroes were replevied by the defendant—and bond given under the statute, by the defendant—who kept possession

of the negroes. The condition is such, as is usual in such cases. At the May term, 1831, which was the *return term* of the writ, it being the first Circuit Court, by law, to be held after the issuing of the writ, the clerk states the following entries: "At the May term, 1831, of said Court, the following appearances were entered, to wit:

Peck,	{	William Nabors	{	<i>Detinue."</i>
		vs.		
Mardis.	{	Samuel Nabors.	}	

There is nothing else to show any appearance by the defendant, by himself, or by counsel. The plaintiff filed his declaration at this term, and the cause was continued.

At the October term, following, the plaintiff moved the Court to reject a plea, which appears to have been found among the papers of the suit, because there was no endorsement by the clerk of the Court, showing that the plea had been filed within the time allowed for pleading. This plea is entitled of the May term, 1831, of the Court, was sworn to on the 29th of October, 1831, and is a plea in abatement to the writ, by the defendant in his own proper person, and alleges for matter of abatement,—that by the act of the 16th of January, 1830, the Circuit Court for Shelby County, was required to be held on the fifth Monday after the 4th Monday in March, and not on the 5th Monday after the 4th Monday in February, as is alleged in the writ; and that, because the proper term of the said Court is not set forth in the writ, he prays that the same may be quashed. This plea was rejected by the Court; and the defendant refusing to plead to the action, a judgment by default was taken, and a writ of inquiry was awarded, and judgment for the plaintiff for the negroes, and for damages for the detention.

The defendant has brought the case to this Court,

by writ of error ; and has assigned for error, the insufficiency of the writ, it being made returnable at a time when there was no Court.

It is admitted the writ is defective ; but the defendant in error insists that the defect has been cured by the appearance by the defendant, by himself and counsel.

1. Because the giving of the replevy bond, is an appearance in law.

2. Because the statement of the clerk, shews that Mr. Mardis was substantially entered as his counsel at the return term ; and,

3. Because the filing of the plea in abatement, is a sufficient appearance.

The Court does not consider either, or all of the above reasons a sufficient answer to the objections to the writ. The giving of the replevy bond, was a matter necessary to recover possession of the negroes, who had been taken into the custody of the sheriff by virtue of the writ, and without that they would have gone into the possession of the plaintiff, who had given the necessary bond on procuring the writ. It was not such a voluntary act as manifested an intention to waive the defect of the writ, and cannot be insisted on as such.

The alleged appearance of Mr. Mardis, is not such as is required by the first general rule, adopted in July, 1830, for the government of proceedings in the Circuit Court. That rule requires the clerk to keep a "Book of Appearances," in which, counsel desiring to appear in any suit, shall make in said book, or cause the clerk to make, an entry of his name, stating the cause in which he wishes to appear, the party or person for whom he appears, and the date of the entry. Such entry is considered an appearance.

The statement in this record does not furnish any one of these particulars, in the manner pointed out by

the rule. It does not shew by whom, when, or on what the entry was made. It does not come up to the decision in the case of *Cain vs. Sullivan*,* cited by the defendant's counsel; for there, it appeared, the entry was on the docket. This rule was intended to remedy the mischiefs growing out of that decision; and the Court cannot relax its provisions by intendment. An appearance made and certified under this rule, would bind the party. It would be a voluntary appearance, and would cure all defects of an anterior date, not taken advantage of in time.

*Ala. Rep 31.

Neither can the Court consider the appearance by the defendant, as set forth in the effort to get the benefit of the plea in abatement, as such voluntary appearance as will, in the event of failure, cure the defect. To say that a party who appears to assert a defence upon an alleged defect in the proceedings, not going to the merits of the action, shall be precluded from having the benefit of an examination in a higher tribunal, into the validity of that defence, because he fails, in his efforts below, would be unjust in the extreme. By this mode of reasoning, if he fails, he has cured the defect by making the point, and if he pleads over, he cannot assign it for error here. He is, therefore, virtually precluded from trying his defence at all. If the defect is such an one as is properly the subject of an assignment of error, his having failed in endeavoring to assert his right in the Court below, ought not to preclude his being heard here.

But the Court is not satisfied that the defect in this writ, is such, as can be assigned for error in this Court. By the act, regulating the issuing of process,*

*Aik. Dig. 278. "All original process shall be issued by the clerk, and shall be *returnable to the first day of the term*, be served five days before the term; and where the

process issues within five days of the beginning of a term, it shall be made returnable to the next term after that then to be held;" and, "all writs and process issued, *made returnable*, or executed, in any other manner, *or at any other time, may be abated* on the plea of the defendant."

It will not be contended, that an error in the return of a writ, makes the writ *de facto*, a nullity: it is defective, and may be *abated by plea*. But if it have all the other essential qualities necessary to constitute a good writ—if it be signed and tested by the clerk—be directed to the sheriff—describe the Court properly—have proper parties—and contain a proper cause of action, it shall not be rejected by the Court *ex officio*. The statute has not declared such a writ void. It contemplates the possibility of errors, in the acts of the clerk, and provides a remedy, by which the defendant shall be permitted to avail himself of the defect, and get the benefit of the delay.

By reference to *Bacon's Abridgment*,^a it will be seen, ^{a Title, Abatement; letter K.} that such acts as make a writ void, are those which shew that nothing can cure the defect—such, as that no judgment could be rendered thereon. The term used in our statute, that a writ thus defective, *may be abated*, is understood by the Court, to be synonymous with *must be abated*; and excludes the idea of any other mode of taking advantage of the defect. Where a party has been served with process, it is a notice to him, which puts him upon his defence. If he discover a defect which renders the writ void, he may disregard the process; and if judgment be rendered against him below, he may come here and get redress. But if the defect be only an abateable one, *by plea*, he must apply himself to his defence at the proper time, in the proper place, and by the mode prescribed by the statute. And if he neglect those

requisitions, the law considers him as having waived his privilege; and this Court, sitting here to revise the proceedings of the other tribunals, is not authorised to consider itself at liberty to overturn proceedings, of which those tribunals have had full cognizance, for technical defects, when the party has negligently, or pertinaciously refused to make his defence at the proper time, and after a full opportunity has been afforded him. This Court has often looked into a writ for the purpose of amendment; but no case is to be found, where it has reversed proceedings upon an assignment reaching only to an abateable defect in a writ, where all other proceedings are regular.

In this case, the writ was served, and was returnable before the regular term. The declaration was filed in time—the defendant was fully apprised of it—but for a technical defect would have appeared by counsel—had a continuance—attempted to get the benefit of the plea of abatement; but does not pretend he was in time, and does not assign as error, the rejection of his plea—is required to plead over—refuses—stands by and permits a judgment, without attempting a defence—and has now come here, and wishes to avail himself of a defence, which, at no time is favored by the law, and which has, so far as I am acquainted, never been allowed in a Court of Error; and which, while this Court is, as at present composed, will not be allowed.

Let the judgment be affirmed.

NEIL, use &c, versus CUNNINGHAM'S EXECUTORS.

Where it appeared, that a demand against an estate had not been presented within eighteen months after the grant of letters testamentary, but, that, the demand had accrued after that period; held,

That the demand was not precluded or barred under the statute of non-claim, as that statute does not commence running until the claim has accrued, or the party has a right to sue.

Neil brought an action of debt, in the Circuit Court of Madison, against Cunningham's executors, to recover an amount, alleged to have been due by the defendants' testator, as the surety of one Buford. Buford was the deputy of the plaintiff; and the cause of action was a sum of money, paid by Neil, to another, for Buford's default. The statute of non-claim was interposed to the recovery of the plaintiff, and the Court below, decided that the claim should have been presented within eighteen months after the grant of letters testamentary on Cunningham's estate. There was, under this opinion of the Court, a judgment for the defendants; and, on a bill of exceptions, the plaintiff brought the case to this Court, and insisted, that as the money for Buford's default was not paid by him until after the grant of letters, the statute formed no bar, but that the eighteen months commenced running, if at all, when the cause of action accrued.

HOPKINS, for Plaintiff—cited 2 *Call. Rep.* 322—4 *Day's Rep.* 476.

McCLUNG, *contra*.

By Mr. Justice HITCHCOCK:

This case comes before the Court, upon an exception to the opinion of the Judge of the Circuit Court of Madison county, upon the construction of the sta-

tute of non claim. 'The defendants were sued as executors of J. B. Cunningham, who was the security of one Buford, who was a deputy sheriff under the plaintiff, and who had had money to pay, as sheriff, for said Buford's default. More than eighteen months had elapsed after the death of Cunningham, and the grant of letters testamentary to the present defendants before the demand was made by the plaintiffs of them, for the sum paid for Buford's default, but less than that time had elapsed after the payment of the money by the plaintiffs, and the demand. The Court below, allowed the bar, and decided that the claim should have been presented within eighteen months after the grant of letters testamentary on Cunningham's estate.

By our statute of non claim,* "all claims against the estates of deceased persons shall be presented to the executor or administrator within eighteen months after the same *shall have accrued*, or within eighteen months after letters testamentary or letters of administration shall have been granted, and not after, and all claims not presented within the time aforesaid, shall be forever barred from a recovery;" with the exceptions of minors, femes covert, persons insane, or non compos mentis, debts contracted out of the state, and claims of heirs and legatees claiming as such.

The claim of the present plaintiff, was for money he had been compelled to pay for Buford, whose security the present defendant's testator was. It did not *accrue*, within the meaning of the statute, until he had paid it. It is true, he held Cunningham's bond, but it created only a contingent liability which might never become absolute. Neil was sued—Buford was defending—the default of Buford might never be established, and when established, he might pay it. Neil was not at liberty to make a voluntary payment, or at least he was not bound to, in order to

* Ark. Dig. 153,
§ 6.

be able to call upon Cunningham's executors, and they were not bound or authorised to pay until Neil had been legally compelled to pay the default of Buford. There was, therefore, no use in making the claim, and the law will not require that to be done, which, when done, is of no use. Suppose Buford's default had not happened until eighteen months after Cunningham's death, and as much longer time had elapsed before Neil had been compelled to pay, could he have no redress? Suppose the estate had been divided among the heirs, could he not sue them? Surely he could. The first clause in the statute was to embrace such cases as this. It contemplates cases which may arise when the claim may not accrue until after eighteen months has elapsed from the grant of letters, and if the party brings himself within that time he may recover.

The decision of this Court, in the case of *Bigger, adm'r. vs. Hutchings & Smith, adm'rs.*,² does not conflict with the views taken in this case. The principle of that case is, that where the claim has accrued, as was the case there, for it was on a judgment by attachment in Georgia, against the defendants' intestate, it must be presented in within eighteen months, and the mere issuing of a writ which was afterwards dismissed, was not a sufficient presentation. It must be in such manner as "to furnish the administrator with such vouchers and reasonable evidence as might induce a belief that the claim was just."²

In this case, the bond was shewn to the executors, and within eighteen months; but at that time there had no *claim accrued*, and as the act was not required, it is not necessary to decide, therefore, whether it would have been a good presentation to bar the claim if it had then accrued.

The case cited from 4 *Day's Rep.* 476, is in point.

² Stew't, 445.

The act of Connecticut is similar to ours in this respect, allowing two years for the bar, and it was there decided, that the statute did not begin to run until the plaintiffs had a right to sue.

The judgment must be reversed, and the cause be remanded.

PLEDGER versus GLOVER.

The finding of a jury, in determining mutual demands between a plaintiff and defendant, "that they find the plaintiff indebted to the defendant in the sum of two dollars and forty cents, over and above the plaintiff's demand in this behalf," is good. A notice of set-off, is no part of the record, and any errors in the proof relating to it, must be shewn by bill of exceptions.

Pledger, bearer of Chapman, instituted an action of *assumpsit*, in the Circuit Court of Marengo, against Glover. The cause of action was a note of hand for fifty dollars. The plea of *non assumpsit* was relied on, with a notice of set-off. The jury rendered a verdict in favor of the defendant, for two dollars and forty cents; on which the plaintiff took his writ of error to this Court, and assigned as cause for reversal,

1st. That the judgment was erroneous, and not responsive to the issue.

2d. That the Court erred in rendering judgment on the verdict.

PICKENS, for Plaintiff—STEWART, *contra*.

By Mr. Justice HITCHCOCK :

This is an action of *assumpsit*, on a note given by the defendant to one William W. Chapman, or bearer, dated 9th December, 1829, for fifty dollars. The

suit is brought by Pledger, as bearer. The defendant pleaded non assumpsit, and there is a verdict for the defendant in the following words: The jury upon their oath do say, "that they find the plaintiff indebted to the defendant in the sum of two dollars and forty cents, over and above the plaintiff's demand in this behalf:" upon which there is a judgment for the defendant for that sum. Appended to the plea of non assumpsit, is a notice signed by William G. Alston, as attorney for the defendant, addressed to Jeremiah Jones, attorney for the plaintiff; in which he states that the defendant will off-set at the trial of the cause, a note for fifty two dollars twelve and a half cents, which the defendant held against Chapman, before notice of the transfer by him, of the note sued on, to the plaintiff.

There are two assignments of error.

1. That the verdict is erroneous, and not responsive to the issue.

2. That the Court erred in rendering a judgment on the verdict, against the plaintiff.

Our statute of set-off, authorises a defendant, where there are mutual debts between him and the plaintiff, to set one debt off against the other, either by pleading the general debt intended to be off-set, in bar, or by pleading the general issue, and giving the plaintiff notice of the particular debt so intended to be set-off, stating on what account the same is due.* The party has his election, which mode to pursue. If he pleads the set off, the defendant must reply; but if he does not plead specially the set off, but rely upon giving notice under the general issue, the plaintiff does not reply,^b 1 Chitty's Pl. 605, 606. but makes his defence on the trial.^b This mode of proceeding, however, can only be had when the action is such as will admit of the plea of the general issue. When, either the debt sued on, or the set-off

to be made, has accrued by bond or penalty, then the plea of set-off must be made. It is only in cases where neither debt has accrued by reason of a penalty, that
 •1 Ch. Pl. 607. the defendant has his election, either to plead, or give notice of set-off.

In this case, there is no plea of set-off. The plea is the general issue. The notice of set off is no part of the record. It is a practical proceeding, addressed by the attorney of the defendant to the attorney of the plaintiff, and does not admit of, or require a replication; and if the plaintiff relies upon the statute of
 •3 Ch. Pl. 933. limitations, he does not plead it as in case of a plea of set-off, but gives it in evidence on the trial. And if there be error on the trial below, it must be brought to the notice of this Court, by bill of exceptions.

Excluding then, from our consideration, the notice of set-off in this record, there does not appear to be any error in the proceedings below. The statute allowing sets off, declares, that "if it appear to the jury that the plaintiff is overpaid, they shall give a verdict for the defendant, and withall, certify to the Court how much they find the plaintiff to be indebted, or in arrear to the defendant, more than will answer the debt or sum demanded," upon which judgment shall be entered for the defendant. This verdict is a substantial compliance with this part of the statute. They say that the plaintiff is indebted to the defendant two dollars and forty cents more than his (the plaintiff's) demand. This is finding the plaintiff overpaid; and by necessary inference, finds a verdict for the defendant. There is, it is true, no technical finding that "the defendant did not assume and promise as set forth in the plaintiff's declaration;" but all this is substantially found, and is such a verdict as will sustain a judgment upon it.

The argument of the plaintiff's counsel proceeds

upon the supposition, that the notice of set-off is a part of the record, and that the verdict is contrary to law, as it does not shew any mutual dealings between the parties. Had the plaintiff pleaded the set-off, instead of giving notice of it, and thereby presented the matter of defence on the record, (which in general, is much the best and safest way,) the second assignment might have been reached. But, for aught that appears to the Court, the defendant may have given such notice of set-off as would shew a balance in his favor; and this Court must presume such to be the case, in the absence of record proof to the contrary—which proof should have been presented by bill of exceptions.

The judgment therefore, must be affirmed.

HAUGHY *versus* STRANG.

It is a rule of practice in equity, that a bill may be dismissed, *on motion*, at any time, for want of equity.

Where Courts of Law and Equity have concurrent jurisdiction of a matter of defence, and a defendant elects to defend at law, and fails, he will not be permitted afterwards to apply to chancery, unless such failure has resulted from unavoidable accident.

The refusal, of a Common Law Judge, to grant a new trial, in a case adjudged before him, and where all the facts were properly cognizable, is not a good cause for an application to chancery.

The complainant, Haughy, filed his bill in the Chancery Court of Tuscaloosa county, for relief against a judgment at law. The bill stated, that the defendant in error had recovered judgment against the complainant, in an action of trover; that the property was that of the complainant, and that on trial, (the Court having convened earlier than usual, when he was not enabled to assemble his witnesses,) ~~unfair~~

evidence, as he was informed, was introduced against him. That he afterwards applied for a new trial, which was refused by the presiding Judge.

The defendant filed an answer, and the cause, after being several times continued, was dismissed, on motion, for want of equity apparent on the face of the bill.

A writ of error was thereupon taken to this Court, and it was said,

1st. That the Chancellor erred in dismissing the bill, *on motion*.

2d. That the bill was entitled to equity.

STEWART, for Plaintiff.—I object that it was too late, except on final trial, to dismiss for want of equity. The doctrine is, as to there having been a trial at law, that where the party has not had an opportunity to make his defence, equity will relieve. In a question of this kind, the bill must be taken as true. Here, there is a charge of fraud, duress, and oppression, and of the fact, that the defendant had no opportunity to make his defence. But, the Judge that dismissed the bill, said, that no Judge could have been so oppressive as to proceed in the manner charged. But it will not do for a chancellor, acting on matter appearing on the face of a bill, to say that he does not believe its statements. The statements of the bill must be taken as true; and from these it appears, that the Court, in the Common Law suit, sat at an unusual hour, when the defendant Haughy was not present; that Strang introduced fraudulent proof—proof of money paid, that had in fact been settled; and that he had no opportunity of defending himself below. The bill charges fraud, force, and duress, in the commencement of the affair—fraud also, in the manner of prosecuting the suit. Under these circum-

stances, chancery will open the case, and grant relief to the amount of the excess beyond what Haughy received. Strang received the goods as a pledge; and yet, in the action at law, he recovered their value. This was recovering the amount of a penalty: and to relieve against a penalty is the province of a Court of Chancery.

I doubt whether we are compelled to assert our equitable right to redeem, in a Court of law. Could we have been relieved there? and, if we could, has not chancery, in a case like this, also jurisdiction? The most that could be said on the other side, would be, to raise the question of costs.

ELLIS, *contra*.—I have always understood the rule to be, that a motion may be made at any time, to dismiss for want of equity on the face of the bill. The proceeding, I conceive, was regular. The Court is referred to Rule 7th, of this Court, on the subject of Chancery practice.

This bill wants equity on its face. Courts of Chancery will not relieve against a verdict and judgment at law, where the party might have made a complete defence.

Strang was entitled to the value of the goods. The agreement was, that they were to be his property, if it should appear that the money had been received by the sub-agent, and Haughy should fail to pay over the money. If these goods should be considered as having been mortgaged, it was competent for the mortgagor to give evidence in a Court of Law, in reduction of damages. There is, therefore, no ground for the interference of a Court of Equity.

The reason given for not defending at law, is insufficient. "The Court," it is said, "met at an unusual hour." Did it meet before the time it adjourn-

ed to? It is not stated. The excuse is of the most flimsy kind. Are Courts to attend to the convenience or the caprice of parties? Relax the rule to this extent, and all cases will be drawn into Courts of Chancery. The rule is, that chancery will not relieve against a trial at law, where the party might have made a complete defence. There is no shewing in this bill, of fraud in obtaining the judgment—no shewing of accident, surprise, or any thing else that would bring the case within the exceptions to the rule, as I have laid it down.—1 *Marsh.* 13, 16, 155, 312—3 *Littell*, 430—4 *Littell*, 163, '4—3 *Johns. Ch. Rep.* 351 to 356—4 *Johns. Ch. Rep.* 566—6 *Johns. Ch. Rep.* 87, 479.—3 *Dessaussure's Rep.* 325—*Hardin's Rep.* 173.

By Mr. Justice THORNTON.

This cause is brought up by writ of error, from a final decree of a chancellor, dismissing the bill of the plaintiff, on motion, for want of equity on the face of the bill, after answer filed, and after several continuances of the cause.

The first error assigned, questions the propriety of dismissing the bill, on motion. Independent of any general authority for this course, we have an express rule of practice, which allows it. The complainant cannot justly complain of a result, which would have been inevitable at the final trial, no matter how long protracted, if the merits of his bill were disallowed. The time when a bill is dismissed for such a cause, being immaterial, the only question which can arise, is, whether the dismissal was proper, with reference to the matter which it contains. The bill in this case, reduced to its substance, is, to this effect. The complainant was sued in the Circuit Court of Tuscaloosa, in an action of Trover, and a recovery had against him by the defendant. It alleges,

that the property sued for, was, in truth and in fact, that of the complainant; that it had been pledged to the defendant only; and that the pledge was extorted by duress; that on the day when the judgment at law was recovered, the Court met at an earlier hour than was usual at that season of the year; so, that neither he or his witnesses were present; that, as he was informed, though he does not say he believes it, unfair evidence was introduced upon this trial, not relative to the matter in controversy; that he made an application to the presiding Judge for a new trial, which was unkindly denied.

In deciding upon the propriety of dismissing this bill, two questions present themselves. The first is, whether the matters set forth were not all properly cognizable in the Court of Law, and might not have been fully availed, in defence of the action which he now seeks to overhaul: And, secondly, whether the facts alleged, by way of excuse, for not having done so, are sufficient to authorise an interference by a chancellor; especially as a new trial has been refused by the tribunal before whom the whole matter transpired. The doctrine is, that if the matter set up in the bill constitutes a good legal defence to the action, equity will not entertain a complaint; unless, without any fault or negligence on the part of the complainant, by circumstances beyond his power to control, an opportunity of making that defence, was lost. As to the matter of this bill, whether of fraud, of duress, pledge of the property, or whatever else it discloses, I entertain no doubt, that there was ample means of relief in the trial at Common Law, according to the principles which regulate that forum: and I am equally clear, that the failure to avail himself of them, was not the consequence of such necessity as would authorise the interposition of chancery.

There is another principle applicable to this case, as now presented, which, in my opinion, is decisive against the plaintiff. It is this: if a matter of defence is optional with a defendant, the Court of Law and of Equity, having concurrent jurisdiction, however he might defend at law or not, yet if he elect to do so, and fail, he cannot afterwards apply to chancery, unless that failure has been occasioned by unavoidable accident. Now, the application for a new trial, is one of those means of legal relief, which will, in presumption of law, always be allowed to prevail, in a case where the matter has not been settled in such a way as ought to be conclusive on the rights of the applicant. The very question attempted to be agitated in this bill, we are bound to consider as having been determined adversely to the complainant, when his motion for a new trial was heard and overruled by the Common Law Judge.

In every view which we can take of this case, we arrive at the conclusion, that the decree below, must be affirmed.

MALONE AND LAKE *versus* EASTIN AND GAYLE.

The Supreme Court will not review the discretionary power of an inferior Court, in granting or withholding new trials.

Where part of the term of a Court was held by one Judge, and part by another, held, that the latter was not precluded from considering a motion for a new trial, in a cause adjudged by the former.

This was a motion for a *mandamus*.

It appeared, that in this cause a new trial had been granted by a Judge, who had not presided at the first decision. The term was held by two Judges suc-

cessively, one of whom had left the bench for some cause unknown, and it was here assigned as good cause for the *mandamus* to issue, that his successor had considered and granted the new trial.

By Mr. Justice THORNTON:

This motion is submitted upon a record of proceedings had in the Circuit Court of Greene county. The record shews a judgment rendered for the plaintiffs, and at the same time, an order vacating that judgment, and granting a new trial, upon payment of costs.

The effect of the motion here submitted, if successful, will be to revise, and reverse the order granting this new trial. It has been established as the settled doctrine of this Court, not to review the exercise of the discretionary power of the Judges of the inferior Courts, in granting, or withholding new trials. The peculiar circumstances of this case, have been supposed, by the counsel who makes the motion, sufficient to authorise and demand, a departure from this rule of practice. It seems, that the Judge who presided at the trial, for some cause which doubtless fully warranted the measure, signed the minutes of the proceedings had during a part of the term, and that, during the remainder of it, another Judge held the Court; which last Judge granted the new trial. The argument for this motion, is, that the discretionary power to grant a new trial, can only be properly exercised by the Judge who heard the cause; that the very reason, which it is supposed influenced this Court to decline in such case, a reversing power, viz. that it could not be fully possessed of the true grounds upon which the inferior Court proceeded, should induce us to interfere in this case; in which it is assumed, that the Judge who granted it, must have

been ignorant of those facts, which should enter into a consideration of every motion for a matter of this kind. Now it is not necessary, that a motion for a new trial in this case, was made upon any facts, which could, in any manner, be affected by any thing which transpired during its progress. Suppose the motion were grounded upon a discovery made of testimony, after the former Judge had abdicated, upon a point material to the merits of the controversy ; and upon which, no evidence had been adduced at the former trial. In such a case, and in many others, which might be imagined, the power should be exercised by some one ; and if death, or any other imperious necessity, prevent the Judge who tried the cause, from doing so, I can see no objection to its being done by his successor, who is empowered by law, to act in his stead ? Either he must do it, or there would be a failure of justice ; or a resort must be had to a Court of Chancery. For, at the close of the term, the record is unalterable ; except in a few specified cases of entries, *nunc pro tunc*, from memoranda made during the term. New trials, at law, are not unusually granted by a chancellor, when a proper case is made out, and presented to him. Such a power is warranted, both by principle and precedent. And its exercise in such case, is conclusive, to shew, that there is nothing so incongruous to justice, in the fact that one Judge may hear the cause, and another grant a new trial of it, as seems to be supposed by the counsel who urges this motion. In chancery, to be sure, the matters alleged for the interference in the bill, are allowed to be contradicted by answer, and much delay intervenes before the matter is determined ; whereas, the delay is avoided by the application made to the succeeding Judge ; and in this latter mode, the trial may be had, *de novo*, before the ac-

tion of the chancellor is determined. But as regards the main ground of objection urged, the principle would equally apply to abrogate such authority in the chancellor; for he, no more than the Judge who granted the new trial, heard the one which is set aside by his *fiat*.

The ground of the application in this case, is not apparent from the record; but we are bound to presume it was such, as warranted the interference. But, if it were rashly, or even improvidently allowed, the remedy is not by an application to this Court.

Motion overruled.

ESTILL versus SHELLEY.

Where, in a declaration, in trespass *vi et armis*, the time of committing the trespass was left blank, held, that the defect was one, cured by the statute of amendments, and not available on demurrer.

This action was trespass, *vi et armis*, for carrying away a slave; brought by Estill, in the Circuit Court of Shelby. There was a demurrer to the declaration; and the defect complained of, was, that the time of committing the alleged trespass, was left blank in the declaration. The Court sustained the demurrer, and the plaintiff took his writ of error to this Court.

PECK, for Plaintiff—SHORTDRIDGE, *contra*.

By Mr. Justice HITCHCOCK:

This is an action of trespass, *vi et armis*, for taking and carrying off a slave, the property of the plaintiff. The declaration is in the common form, but

the blanks, as to the time of committing of the alleged trespass, are not filled up; for this, there is a general demurrer. This defect is cured by the statute of amendments, which considers all such defects

•Aik. Dig. 266. as amended.*

The judgment must, therefore, be reversed, and the cause remanded.

BAIRD *versus* NICHOLS.

The balance of an open account, (originally for more than fifty dollars, but reduced below that amount by credits,) is recoverable before a Justice's Court.

Baird commenced proceedings, by warrant, before a Justice of the Peace in Tuskaloosa county, to recover the balance of an open account, alleged to be due by the defendant, Nichols. The magistrate, on the trial, rendered judgment in favor of the plaintiff, for seventeen dollars and twenty two cents, with which he being dissatisfied, removed the case by *certiorari*, into the Circuit Court.

It appeared that the account had originally been for the sum of one hundred and sixty six dollars and sixteen cents, but was reduced by credits, (all admitted by the defendant) to the sum of forty nine dollars one cent, which the plaintiff claimed. The Court below decided, and so charged, that the original demand having been for more than fifty dollars, the Justice of the Peace had no jurisdiction, but that the account should have been sued in the Circuit or County Court. On this decision there was a judgment in favor of the defendant, and Baird, by bill of exceptions brought the case into this Court.

STEWART, for Plaintiff—ELLIS, *contra*.

By Mr. Justice THORNON:

This was a trial in the Circuit Court of Tuska-loosa county, of a case brought before it by *certiorari*, from a Justice of the Peace. The statement of the plaintiff was, that the defendant owed him fifty dollars, for work and labor done, &c. at his, the defendant's special instance and request; and upon *non-assumpsit* plead, an issue was joined. A bill of exceptions was signed at the trial, on which error is assigned in this Court. Upon an examination of the bill of exceptions, it is apparent to my mind, that the only question which could have arisen, was, whether the balance of an account for services rendered, reduced below fifty dollars, by credits, could be recovered by warrant from a Justice of the Peace; and not, whether a warrant would lie for the breach of a contract to perform service, of greater value than fifty dollars. With reference to the question first mentioned, which alone grew out of the testimony stated, the Court charged the jury, that as the amount of the account for service performed, was originally more than fifty dollars, the plaintiff ought not to recover, even though by credits, which he offered to prove, the amount had been reduced below that sum. Now, that question had been differently settled by the decision of this Court, in the case of *King and Dougherty*,^a upon the authority of which, this judgment^{2 Stow's, 487.} must be reversed, and the cause remanded.

THOMAS *versus* ADAMS.

The act of 1820, extending the jurisdiction of the Circuit Court of Cotaco (now Morgan) County, &c. to all the tract of country belonging to the Cherokee Indians; vested in the Circuit Court, the jurisdiction only, of crimes and misdemeanors committed within those tracts of Indian country; and did not extend thereto, the civil jurisdiction of Justices of the Peace, in cases of forcible entry and detainer.

The act of 1832, extending the jurisdiction of the State over the Cherokee Nation, is not entitled to a retroactive operation, so as to authorise proceedings for a forcible entry committed on lands in the Indian nation, prior to the passage of that act.

Thomas instituted proceedings of forcible entry and detainer, in a Justice's Court, in St. Clair county, to recover possession of a tract of land lying in the Cherokee nation, from which, as was alleged, Adams had with force ejected him. A judgment, rendered by the Justice in favor of the plaintiff, was removed into the Circuit Court, by *certiorari*, where the defendant contended that the forcible entry was charged to have been committed before the jurisdiction of the State Courts was extended over the territory in question. The Circuit Court reversed the judgment rendered by the Justice, and the case was brought into this Court by writ of error.

P. MARTIN, for Plaintiff—Contended, that on this point it was impossible to reverse the cause. Whatever question might have arisen as to the jurisdiction of the Court, had the trial taken place, immediately after the entry was committed, was no question now. The act of Assembly extending the jurisdiction of the Courts over the Indian territory, was passed before the trial took place, and gave the Justice, unquestionable jurisdiction. But, independent of that act, it might safely be contended, that the proceeding

could have been supported on the authority of the statute of 1818, which permitted process to run into the Indian territory.

If jurisdiction be not maintained, in cases like the present, what is to control trespasses committed on citizens in the Indian nation, or what tribunal is to adjust civil controversies, between different individuals?

PECK, *contra*—Said, that the forcible entry, if committed at all, was committed in the Cherokee nation, beyond the jurisdiction of our Courts, and before the act of Assembly extending jurisdiction, was passed. The law of forcible entry, for aught that appeared, had no existence in the Indian nation, at the time the trespass was alleged to have been committed. Under these circumstances, the passage of a statute subsequently extending jurisdiction, could not give any ground of suit. If it be said, that the statute only gives the remedy, I answer, that an extraordinary remedy, like this, given by statute, cannot reach back, and operate on acts done, before the law existed.

If the country had been taken by conquest, even then, such retrospective proceeding would not be admissible.

Again: the act extending jurisdiction, if reaching to such a case as the present, was clearly unconstitutional, being in violation of subsisting treaties.

By Mr. Chief-Justice SAFFOLD:

This was an action for a forcible entry and detainer, tried in the county of St. Clair. Thomas was plaintiff below. His plaint to the magistrate, charges, that in 1830, he was in possession, as tenant at the will of the United States, of a certain improvement, of fifty acres or more, of emigrated land, part planted

in corn, and containing, at the time of the trespass, three dwelling houses, a kitchen, a crib with corn in it, also a quantity of farming utensils, &c.—all lying and being within the county of St. Clair, State of Alabama, in the *Cherokee Nation*, known and designated there, as “the Old Village,” on Tarapin creek; and that being so possessed, and peaceably enjoying the same, the defendant, Adams, with force and arms, entered upon, and dispossessed him, and continues to detain the premises aforesaid.

On the trial before the justice, a verdict and judgment were rendered in favor of the plaintiff.

The cause having been removed into the Circuit Court by *certiorari*, Adams assigned for error, various causes, among others, that it appears from the petition and complaint, as made to the magistrate, that the forcible entry complained of, is charged to have been committed in the county and state aforesaid, “in the Cherokee nation,” and on “emigrated land,” and that this was before the jurisdiction of the Court was extended over that portion of the Cherokee nation.

The Circuit Court reversed the judgment of the Justice, and gave judgment in favor of the defendant, for his costs expended; to reverse which, the plaintiff now prosecutes this writ of error.

The ground of error relied on in this Court, is, that the Circuit Court reversed the judgment of the Justice, for the causes assigned.

According to the view we have taken of the case, the exception alluded to, is decisive of the contest, and the one point alone will be considered. The others are peculiar to this case, involving no material or general principle.

My examination of the subject will be directed to the inquiry, whether, in 1830, when this trespass is charged to have been committed, the laws of the State

had been so extended over the lands in question, as to sustain the proceedings which were had before the magistrate; and if not, whether the subsequent extension alone, or that aided by the Common Law, was sufficient—the extension having taken place before the institution of suit?

The action was commenced in May, 1833. In 1820, it was declared by statute,* that “the *Circuit Court* of Cotaco (now Morgan) county, shall have jurisdiction, and the county shall embrace all that tract of country lying west of Willstown Valley, and belonging to the Cherokee nation of Indians. And the county of St. Clair shall *embrace* all that tract of country belonging to the Cherokee nation of Indians, in Willstown Valley, and east of the same. Also, that “the expenses of prosecuting and supporting criminals who are prosecuted for offences committed on Indian lands, shall be paid out of the contingent fund, upon a certificate of the Judge, made out, as in cases now provided for by law.”^b

*Aik. Dig. 222, § 1.

^bAik. Dig. 223, § 2.

It is to be observed, that this act purports an extension of only Circuit Court jurisdiction over the Cherokee nation, and that, as respects St. Clair, it does not even to express that. But, in as much as the first clause of the first section, gives jurisdiction to the Circuit Court of Morgan, and expresses that this county shall embrace one portion of the nation; and the latter clause expresses that St. Clair county shall embrace the residue of the same nation, the intention of the Legislature to extend to the latter county, the same jurisdiction, may well be inferred. Yet, they appear to have been cautious in the terms used, to effect the contemplated extension. The comprehensive language, “civil and criminal jurisdiction,” as often employed on other occasions, seems to have been purposely avoided, and the more limited expres-

sions used, that the *Circuit Court shall have jurisdiction, and the county shall embrace, &c.* Nor is any attempt made to designate the particular boundaries of country thus to be embraced within the two counties; it being only said, that the part lying west of the Valley should be embraced by the one, and that the Valley and part east thereof, by the other. These peculiarities in this statute, and the provision made in the second section, for defraying the expenses of criminal prosecutions, together with the consideration, that, according to the Constitution of the State, in all criminal prosecutions, the accused has a right to a speedy public trial, by an impartial jury of the county or district in which the offence shall have been committed, I think fully warrant the conclusion that nothing more was contemplated by this statute, than to vest in the Circuit Courts of these counties, jurisdiction of crimes and misdemeanors, committed within these tracts of Indian country. No power can be exercised by tribunals of special or limited jurisdiction, except such as has been expressly given. I am, therefore, of opinion, that the qualified extension of jurisdiction to the Circuit Court, as expressed in the above recited act, had not the effect to extend the civil jurisdiction of Justices of the Peace, over the same tracts of country; and without which there could have been no authority for the proceeding, unless the jurisdiction has been subsequently given. It may also be noticed, that at the time this injury is charged to have been committed, no act of our Legislature had declared any abolition of the laws, usages, or customs then in force in the Cherokee nation.

But it is contended in argument, that if the statute referred to, be insufficient to sustain the proceedings in this case, the subsequent act of 1832, being

anterior to the institution of this suit though subsequent to the entry, furnishes the requisite authority.

It is true, that acts were passed at the session of 1831 '32, in terms very different from those used in 1830. An act of this session, declares an extension Aik. Dig. 204. of the civil and criminal jurisdiction of the State over all the Indian territory within the same; also, an abolition of all laws, usages, and customs, then used, enjoyed, or practised, by the Creek or Cherokee Nations of Indians, within the limits of the state, which were contrary to the constitution and laws thereof.

At the same session another act was passed, entitled "An act to designate the boundaries of certain counties therein named," (but I do not find in the late Digest,) which, according to designated boundaries, extended the county of St. Clair over a portion of the Cherokee nation, and also extended other counties in like manner over the residue.

In as much as the plaintiff's complaint before the Justice, charges this forcible entry to have been committed in the county of St. Clair, "in the Cherokee nation," and "on emigrated lands;" a description which is inapplicable to any other part of the county, except that over which the boundary was extended by the act last referred to; and as the counsel, on both sides, treated it in argument, as being in that part, we feel bound so to consider it. Then, the question arises, whether the Courts are authorised to give to this act, extending the laws of the State over that tract of country, subsequent to the commission of the trespass, such retroactive operation, as will entitle the plaintiff to the relief sought. This point of the case would admit of extensive investigation, if the matter in controversy was of sufficient importance to justify it: as it is, however, I will content myself with a brief examination of the principle.

As a general rule, the *remedy* for the assertion of existing rights, is always subject to the *lex fori*, and the Legislature is competent to modify, regulate and apply it, at discretion: but rights, in contradistinction to the remedy, as title to property, the validity and effect of contracts, &c. must be governed by the *lex loci*. As a consequence of this principle, if a right of action has arisen without the jurisdiction of this State, and the party subject to it, afterwards come within the jurisdiction; or if the jurisdiction be extended over the person—the action in either case being transitory in its nature; or, if the jurisdiction, in case of a local action, be extended over the subject matter; in all these cases, the Courts of the State are competent to enforce the right, according to the forms prescribed for the government of our Courts. The exception may exist, that our Courts would not be bound to administer a law of a different country, if found incompatible with our public policy. In administering justice in such case, we should be governed, in reference to the right or title, by the law of the place or country where it originated; but in applying the remedy we can be governed alone by the forms prescribed for our own Courts. If the law, establishing the right, be not proven to the Court, and it is one which exists at Common Law, on the presumption that such is the law of that contract or other subject matter, we are authorised to apply it accordingly. If the right claimed, have no foundation in the Common Law, and the law of the place be not established, our Courts can have no warrant for sustaining the supposed right, and must, of course, refuse it. This principle, I consider no less applicable to the Cherokee nation, while the laws, usages, and customs of the country existed, than to any other government; and if, from the condition of their laws, they cannot be proven.

elsewhere, the only consequence is, that the principles of the Common Law must be applied. This rule is founded in necessity; without it, there could be no authority for entertaining a suit on any bond or note, or enforcing any right, originating in that place, or elsewhere, beyond the jurisdiction of our own Courts.

According to the Common Law, if a man had a right of entry in himself, he was permitted to enter with force and arms; and to detain his possession by force, where his entry was lawful. If he thereby subjected himself to a prosecution, it was only to an indictment for a breach of the peace, where force and violence were in fact, used.* It is true, that such person, like all others in possession of lands, was subject to civil suits, to try the true right of property, or the right of possession, as either might exist at law. But in such suit the estate or merits of the title were subject to examination, and were sufficient to determine the controversy according to the rights of the parties, whether absolute or limited. The right of the plaintiff to restitution did not depend, as provided by our statute, on proof of a mere *forcible entry and detainer*, or *forcible and unlawful detainer*, but on the legal right to possess and enjoy the premises, at least for a term. Under the statute, one who is legally entitled to present possession of the lands, by the means of obtaining the same, as in case of a forcible entry and detainer, may subject himself to ouster, by the summary remedy resorted to in this case. The statute has declared, that in this action, "the estate or merits of the title, shall in no-wise be inquired into." The consequence is, that in this case, the defendant may have entered, as by the Common Law he lawfully might, and yet, under the statute, be subject to immediate restitution to him who had the prior,

*4 Com. Dig.
Entry A. "Note
(a)—Bac. Ab.
Forcible Entry
and Detainer.

though unlawful possession. The object of the statute was merely to prevent the violence and general mischief resulting from the Common Law right, of forcible entry. &c.

Then, the correct rule of construction, does not give to the act, extending the jurisdiction of the State over the Cherokee nation, that retroactive operation which would be necessary to entitle the plaintiff to the relief sought. Had the law been thus extended, before the forcible entry was committed, the principle would be entirely different, as it would also be, if the right claimed, under the facts of the case, would, at Common Law, entitle the plaintiff to immediate restitution.

From this view of the subject, alone, it results, that the judgment below, must be affirmed.

PIERCE & BALDWIN, use, &c. versus HICKENBURG.

In an action by partners, on a partnership demand, a judgment, obtained against one of the firm, by the defendant, is not available as an off-set.

Pierce & Baldwin, for the use of Stewart, brought an action of *assumpsit* against the defendant, in the Circuit Court of Tuskaloosa. They declared, as co-partners, and merchants, for goods sold by the firm, to the defendant, and the pleas filed, were, *non assumpsit*, payment, and set-off.

On the trial, the defendant offered as a set-off to the plaintiffs' demand, a judgment, obtained by him against Pierce, one of the partners, which, the Court, after objection, admitted. It was proved, that the firm of Pierce & Baldwin had failed—that all the ef-

facts of the copartnership, and its rights and credits, had been assigned to Stewart, as trustee, by deed of assignment, duly recorded, for the payment of the debts due by the copartnership, and that there was not a sufficiency of assets of the firm to pay the firm debts, according to the provisions of the deed of assignment.

The Court charged the jury, that the judgment against Pierce was a good set-off against the plaintiffs' demand, and that the assignment, failure, &c. did not vary the principle. Judgment having been rendered against the plaintiffs, the case, by bill of exceptions, was brought into this Court.

STEWART, for Plaintiff.—ELLIS, *contra*.

By Mr. Justice THORNTON:

This was an action of *assumpsit*, brought in the Circuit Court of Tuskaloosa, by the plaintiffs in error, as partners in trade, against the defendant. The pleas were filed in short, *non assumpsit*, payment, and set-off. At the trial of the cause, as appears by a bill of exceptions, signed by the presiding Judge, the defendant offered in evidence, as a set-off against the demand of the plaintiffs, the record of a judgment, obtained by the defendant, against the plaintiff, Pierce; which, the objection of the plaintiffs', notwithstanding, was admitted by the Court; who charged the jury, that it was a proper set-off against the claim of the plaintiffs.

All the assignments of error involve only one question, viz: whether this instruction was correct or not. Unaccompanied with any other proof, shewing the liability of the firm to pay that judgment, it was clearly inadmissible. The doctrine is well settled, adversely to the allowance of the set-off, of an individu-

al debt, due by one member of the firm, against a partnership demand. The debt sued for, must be conceded to be, in part, at least, the property of Baldwin: then to allow it to be paid off by a claim against Pierce, would to that extent, at any rate, be a manifest injustice. But by the settled rule of law on this head, to no amount whatever, not even to the extent of Pierce's acknowledged interest, which would be the utmost that could be pretended to be claimed, with any shadow of justice, can a set-off be allowed. Could the defendant, by adopting a separate action, for which the set-off is only a statutory substitute, recover from the plaintiffs the amount of this judgment? Certainly he could not. Now, I understand this to be a decisive test, whenever the party plaintiff, whether one or more, sues on an original demand, and not one derived through an assignment, that the party defendant, or some one or more of them, must be able to sustain a cross action against the plaintiff, or there can be no set-off maintained.

We have been referred, by the counsel for the defendant in error, to the case, decided by this Court, of *Minor's R. 331* *Pitcher & Remsen vs. Patrick's adm'rs,* to support the judgment in this case. The principle of that decision, is recognised as sound law, but it does not conflict with this opinion. There, the defendants were joint obligors, and an action could be maintained by the defendant, Remsen, against the plaintiff, for the debt offered to be set-off: so, that the principle of the remedial statute, allowing a set-off in the nature of a cross action, directly embraced the case. Whatever extinguished the plaintiff's demand, whether moving from one or the other of the defendants, was equally available to both. But here, the plaintiffs are joint creditors, and no action could be maintained against them, to recover the amount of the judgment

against Pierce. So there is no pretext for allowing the set-off, whose office is, merely to effectuate summarily, what a distinct action would otherwise be necessary to accomplish.

Let the judgment be reversed, and the cause remanded.

MERRIWETHER *versus* GARVIN.

The certificate of a presiding Judge, to the record of another State, *that the clerk attesting the record, was clerk at the date of his, the Judge's certificate, and that the attestation was in proper form*; held to be a sufficient compliance with the provisions of the act of Congress regulating the authentication of records. It is not essential, that the Judge's certificate should state, *that the clerk attesting the record, was clerk, at the date of attestation.*

An action of debt was commenced by Merriwether, against the defendant, in the Circuit Court of Tuscaloosa. The cause of action declared on, was the record of a judgment, originally rendered against the defendant in the State of Georgia. Under the plea, of *nul tiel record*, the Court below rejected the record, on the ground of its insufficient authentication. It appeared, that the presiding Judge, whose certificate was appended to the record, certified only, that the clerk who attested the same, was clerk, at the date of the certificate, and that his attestation was in due form. The Circuit Court ruled, that the certificate should have shewn, that the clerk attesting the record, was clerk at the date of attestation. Judgment being rendered for the defendant, a writ of error was taken by the plaintiff, to this Court.

STEWART, for Plaintiff,—cited 1 *Starkie*, 154—*Brown vs. Adair*, July Term, 1831.

CRABB, *contra*.

By Mr. Justice THORNTON:

This was an action of debt in the Circuit Court of Tuskaloosa county, upon a record of a judgment rendered in the State of Georgia, in favor of the plaintiff in error, who was the plaintiff also in the Court below, against the defendant. The record shews, that issues were joined upon the pleas of *nul tiel record*, and of payment: and that upon the trial of the first issue by the Court, the record declared on, was held to be insufficient, for a defect in its authentication; which defect was, that the certificate of the presiding Judge, omitted to state, that the clerk who attested the record, was clerk, at the date of his attestation, and certified only, that he was so, at the date of his, the Judge's certificate, and that such attestation was in due form.

That there was error, in rejecting the record for this cause, has been decided in this Court, in the case of *Brown vs. Adair*, at July Term, 1831; which decision, we still think, contains the just exposition of the act of Congress, regulating the authentication of judicial proceedings. For this, which is the only matter presented to the consideration of the Court, by the assignment of errors, the judgment of the Court below must be reversed, and the cause remanded for further proceedings to be had therein.

JOHNSON AND WASH *versus* CHRISTIAN AND GOYNE.

In proceedings before Justices of the Peace, in cases of *forcible entry and detainment*, a party is entitled to the peremptory challenge of a juror, as in civil cases, in the Circuit or County Courts.

This action was originally commenced by the plaintiffs in error, before a Justice of the Peace, in Tuska-loosa county, for an unlawful detainer, by the defendants.

In the course of the trial, the defendants insisted on the right of a peremptory challenge to one of the jurors, which the magistrate refused. A verdict and judgment having been rendered in favor of the plaintiffs, the case was taken to the Circuit Court by *certiorari*, and reversed, on the ground, that the Justice erred in refusing the defendants the right of challenge. The plaintiffs took their writ of error to this Court; and assigned as cause for reversal, that the Circuit Court erred in its decision, in as much, as the acts of Assembly, giving the right of peremptory challenge to jurors, referred alone to trials in the Circuit and County Courts, and not to cases like the present.

ELLIS, for Plaintiffs.—The question in this case turns on the right of a Justice of the Peace to refuse to allow a peremptory challenge to a juror, in a trial for forcible entry and detainer. The act of 1820 only extended this privilege of peremptory challenge to parties litigant in the Circuit Court. It did not extend even to trials in the County Courts: to these, it was afterwards extended, by another act. The language of the law, though general, must be restricted to the subject matter of the statute, and that was, proceedings in the Circuit Courts.

That the unlimited construction is not the true one. is apparent from the consequences that would follow. We had an act which authorised a jury of seven persons, under certain circumstances. If you admit the privilege of peremptory challenge, as given by the act of 1820, to extend to cases of this kind, a majority of the jury might be excluded.

If arguments, from inconvenience, may be urged on the other side, how much stronger are they on ours! We are not to expect by-standers at these trials, in the country. Suppose a jury set aside by peremptory challenge, and challenges for cause. In such a case, it would often be difficult, if not impossible, to obtain another jury.

STEWART, *contra*.—The act of 1820, is positive, and embraces “all jury trials.” The words cannot be limited, in the manner contended for. The jury, spoken of by counsel, composed of seven men, however it may have been styled, does not come within the meaning of the term. A jury is composed of twelve men.

As to the reason of the case, there is more need of this privilege in trials in the country, under the management of the magistrate and constable, than where the jury are empaneled under the regulations of the Circuit Court. But the statute is full and explicit, and needs not the aid of this reasoning.

By Mr. Justice HITCHCOCK :

This was an action of *unlawful detainer*, brought by the plaintiffs in error against the defendants, before a Justice of the Peace in and for the county of Tuscaloosa. The case was tried by a jury, and a verdict was had in favor of the plaintiffs. It was taken by *certiorari* into the Circuit Court for that county :

and was reversed upon an assignment, "that the justice refused to the defendants the right of peremptory challenge to one of the jurors." It has been brought into this Court by writ of error; and the only question is, whether in such a case, either party is entitled to a peremptory challenge.

By the 11th section of "an act to alter and enlarge the terms of the Circuit Courts of this State," passed December, 1820, it is enacted, "that in all jury trials either party may and shall have the right to a peremptory challenge to four of the jury."

The counsel for the plaintiffs in error, contend, that by the Common Law, the right of peremptory challenge was confined to cases of treason and felony, and that *Justices of Nisi Prius* could not grant any *tales*, prior to the statute of 35 Henry VIII, chap. 6—that the Court in which this proceeding was had, is a Court of special and limited jurisdiction—that its proceedings are summary, and in derogation of the Common Law—that the act of 1805, giving this mode of proceeding, does not give the right of peremptory challenge; nor does it give the right to grant *tales*—that the act of 1820, is an act relating to the Circuit Court, and that therefore, the right of peremptory challenge given by it, should be confined to that Court—and that the Legislature must have so intended it; as in the next year they extended the same privilege, by act, to the County Court, which they would not have done, if they had considered the first act as extending to the juries in all the Courts.

The act of 1820, giving the right of peremptory challenge, is general in its terms. It says, "that in all jury trials, either party shall have the right," &c. The act is remedial in its character. It was intended to confer a right not known to the Common Law. It is, therefore, entitled to a liberal construction—so

as to "suppress the mischief, and advance the remedy." The jury contemplated by the act of 1805, comes within the mischief intended to be remedied, as much as any jury in the Circuit Court, if not much more. The power of the sheriff is much greater here, than in the empanneling of jurors for the Circuit Court; and there is no reason that can be offered, for extending the right of peremptory challenge in the Circuit Court, which does not immediately apply to a case of the kind now under consideration.

* Bacon, title
Statutes.

It is true, the title of the act in which this section is found, relates to the Circuit Court; but the title of an act does not control its provisions.* It may serve to explain a doubtful matter in an act, if its meaning cannot be otherwise ascertained; but it cannot be resorted to, to restrain, limit, or control, a plain and palpable enactment; and by reference to that act, it will be seen, that there are other matters contained in it, which do not, in the least, relate to the Circuit Court.

* Bacon, title
Juries C.

Neither does the Court consider the suggestion, that there is no power given by the act of 1805, to summon *tales*, any reason why the act of 1820 should not be extended to this case. By the Common Law, if the jury did not attend, whether by reason of death, or other cause; or if it be reduced by challenge, so that a sufficient number do not remain, the writ of *undecem decem* or *octo tales*, issued to force others into Court to try the issue; and the statute of 35 Henry VIII, was enacted, allowing the plaintiffs to pray a *tales de circumstantibus*, to prevent the delay of the *decem tales*. The statute of 35 Henry VIII, allowed the sheriff to summons the *by-standers*; whereas, the Common Law required the jurors to come from the vicinage or neighborhood of the cause of action. At this day a summons of *by-standers* would be

good, without the statute. The power of filling up the jury is an indispensable incident to the right of trial by jury, and cannot be separated from it without destroying the value of the right itself.

That the Legislature, in the act of 1821, in re-organising the County Court, in one section of which, the right of peremptory challenge of four of the jury is secured to each party, is to be received as any evidence against the construction given, cannot be admitted. That act gave jurisdiction to the County Court in some cases, concurrent with the Circuit Court, and it also provided a jury for the Court; and without the clause in that act, giving the right of peremptory challenge, this Court would have had no difficulty in extending the provision of the act of 1820 to it.

Let the judgment of the Circuit Court, be affirmed.

EVANS *versus* WATROUS.

Where there is a clear and substantial cause of action, set forth in a declaration, although it contains irrelevant, or superfluous matter, or duplicity, yet the defendant shall be bound to answer it.

An attorney at law, is only liable for gross negligence; which is a question of fact, to be determined by the jury.

An averment in a declaration, against an attorney for negligence, that he had negligently commenced a suit, and improperly dismissed it, contrary to his duty, &c.—held, to be a sufficient charge of gross negligence, to put the defendant, upon his plea.

This was an action of *assumpsit*, commenced by the plaintiff, in the Circuit Court of Shelby. The declaration charged the defendant with negligence, as an attorney at law—in this, to wit, that before the institution of the said suit, the plaintiff had entrust-

ed to the care and management of the defendant, for collection and suit, a certain note or obligation, drawn by one May, in favor of one Evans, for the sum of two hundred dollars, and by one Hutchison, indorsed to the plaintiff. That suit had been commenced, and judgment obtained on the same, but that the defendant had neglected to have the proper execution issued on thereon, whereby the debt had been entirely lost to the plaintiff. Also, that afterwards, the said defendant, being instructed by the plaintiff to commence an action against the indorser of the said instrument, had so negligently commenced the same, as to be compelled afterwards, to dismiss it, contrary to his duty and undertaking; by which, costs had been recovered against the plaintiff, and his opportunity of recovery, lost, &c.

The defendant, to this declaration, filed a demurrer, which the Court sustained, and judgment was entered up against the plaintiff.

By writ of error, the case was brought into this Court.

Moony, for Plaintiff.—It is contended, that the Court erred in thus sustaining the demurrer, and rendering judgment. The declaration, I conceive to be substantially good. It is intended to contain two counts. These two counts may not be formally set forth, by technical words. Particular words are not necessary for that purpose. It is sufficient if there be two substantial causes of action stated: it will then be regarded as two counts; and if either be good, a general demurrer to the whole declaration, cannot be sustained. In this case, I do not admit that the demurrer was properly sustainable in regard to either count.

As to the first count, it is averred, that the attorney promised to *collect* the money; he was, therefore,

bound, in pursuance of his undertaking, to see that the proper writs of execution were issued: this, it is averred, he did not do; and that, by subsequent insolvency of the defendant, the debt was lost. The duty of an attorney, when he undertakes to collect, does not cease with the rendition of the judgment. He is required to use all proper diligence to make the collection; and what is proper diligence, is for the Court and jury to determine.

PECK, *contra*.—The declaration clearly contains but one count: it does not profess to contain more; and this count, I am satisfied, the Court below, correctly determined to be bad. It is not the business of the attorney to issue out a writ of execution. Here, it is set forth that the suit was properly brought, but that the attorney did not sue out execution in proper time. The suing out of execution is the duty of the clerk, and not of the attorney. It is, then, averred, that Watrous promised to bring an action against the indorser, and did so, and afterwards improperly dismissed the same. This is a distinct charge of negligence in another case, and amounts to such gross duplicity in pleading, as to render the declaration bad. But the dismissal may not have been any neglect. Many cases may be imagined, in which it would be proper to dismiss.

In regard to making the collection of the debt, by suing out execution, it would frequently be very inconvenient for the attorney to attend to it, who may not live in the same county. The Court is referred to the 4th Rule of this Court, on the subject.

The Court is referred to 1 *Comyn's Digest*, 757, letter B—4 *Burrow*, 2061—8 *Johnson's Rep.* 361—*Aikins Digest*, 263.

By Mr. Justice HITCHCOCK :

This was an action brought by Evans *vs.* Watrous, in the Circuit Court of Shelby county, for negligence as an attorney. There was a demurrer to the declaration, which was sustained, and judgment was rendered against Evans, and one Uriah Jordan, as his security for costs.

The declaration states, that the plaintiff below, had placed in the hands of the defendant, a certain writing obligatory, signed by one Benjamin May, dated 23d January, 1826, for two hundred dollars, payable 25th December, 1826, in favor of, and endorsed by one Jesse J. Evans; that it was also endorsed by one Allen L. Mann and by one Isaac Hutchison, who delivered it to the plaintiff; that the said defendant undertook to collect said writing obligatory, as an attorney at law, for a reasonable reward; that he commenced suit, and obtained judgment against the payor of the instrument, at the August term, 1827, of the Circuit Court of Shelby county; but, that "he wholly failed and neglected, at an early period after the rendition of the judgment, to take the proper and necessary means to have the said judgment executed by collecting from said May, the amount of the judgment and costs," &c.; that if he had "used due and proper diligence in suing out and prosecuting at an early period after the rendition of the said judgment, the proper and legal writ of execution, necessary to carry the said judgment into effect; that the amount of the debt and costs would have been collected from the said May, for that he was, at the time solvent;" but, that before the defendant used the necessary means to have the judgment collected, the defendant became wholly insolvent. The declaration further avers, that after the insolvency of May, the plaintiff instructed the defendant, so being his attorney, to prosecute

suit against Jesse J. Evans, the payer and first indorser of the instrument, and that he undertook to do the same, with all the necessary and proper skill and diligence of an attorney; but, that he "negligently and improvidently, on the 27th October, 1828, issued a writ of *cap. ad respondendum*, from the Circuit Court of Shelby county, against said Evans, on said instrument, and at the Fall term of said Court, he *contrary to his duty and undertaking* as aforesaid, dismissed the said suit, whereby a judgment was rendered against the plaintiff for costs, and that if the said suit had been correctly and skilfully commenced, and faithfully and diligently prosecuted, and had not been dismissed by the defendant; that he, the plaintiff, would have been able, and would have proved all facts and things necessary to have recovered judgment against the said Evans, for the amount of the debt, and that the same could and would have been collected, for that the said Evans was then solvent: but that shortly after, and before a new suit could be made effective against him, the said Evans removed himself and his effects, into the county of Perry, and shortly after, beyond the limits of this State, and the United States, leaving behind him no property from which the money could be made, and so the plaintiff avers, that by the negligence, and unskilful, and improvident management of the said suits, he hath lost his debt," &c.

It is contended, on the part of the plaintiff in error, that this declaration contains substantially two counts; that the charge of negligence, in not collecting the money on the first judgment, is properly stated in one count, and that the charge of negligence, improvidence, and unskilfulness in commencing and dismissing the second suit, is properly a second and distinct count, and that the Court ought so to consider it; but

that if the declaration shall be considered as one connected history of the transaction, the matters stated are sufficient to call upon the defendant for his defence, and that the demurrer ought not to have been sustained.

By the defendant's counsel, it is contended, that the declaration contains but one count—that there are matters set forth, proper for two counts, if for any; that it is therefore bad, for duplicity; that if the Court do not sustain the demurrer for this cause, he contends, that the matters set forth, do not amount to such a charge of negligence or unskilfulness, as will sustain an action for damages; that, as to the first suit, it is not the business of an attorney to see that an execution is issued, that being the duty of the clerk, under the laws of the State, and that the clerk is liable in such case; that, as to the second suit, there is no specific ground of negligence charged; that an attorney is only liable for *gross negligence*, which is not charged in this case.

Without undertaking to decide whether this declaration is to be considered as containing one or two counts, this Court has held that, under our statute, which prohibits special demurrers, where there is a clear and substantial cause of action set forth in a declaration, though it may contain irrelevant or superfluous matter, or though it may contain duplicity, yet, that the defendant shall be held to answer it.

As it respects the misconduct of an attorney, and what acts and omissions will make him liable, it may be remarked, that he is only bound to use reasonable care and skill, in managing the business of his client. If he were further liable, no one would venture to act in that capacity. He is not liable unless he has been guilty of *crassa negligentia*. This, however, is usually a question of fact for a jury; and is to be ascer-

 Burr. 2030
3 Camp. 17, 18

24 Barn. and
Ald. 202—3

2 Barn. & Cres.
219.

tained by the evidence of those who are conversant with the same kind of business.

2 Wils. 328.
6 Bing. 460.

In the case under consideration, the defendant is charged with having omitted the proper and necessary means to have the judgment collected, and that if he had used due diligence in suing out and prosecuting a legal writ of execution, the money could have been made. That it is the duty of the clerks to issue the executions immediately after Court, is admitted; and that, in general, it is the duty of the attorney to see that the clerks do their duty, will not be contended; but that there may not be circumstances which would require the care and attention of the attorney, after judgment, and the omission of which might render him liable; is more than the Court is prepared to say.

As to the second suit, the defendant is directly charged with negligently commencing it, and improperly dismissing it, contrary to his duty. This, is certainly a charge, which unexplained, amounts to gross negligence, and is such as requires a defence. The undertaking of a suit, implies a faithful and diligent prosecution of it; and where it appears by the declaration, that there was a good cause of action, the attorney is bound to shew some reasonable excuse for not conducting it to a successful termination. It is, therefore, the opinion of the Court, that, under the circumstances of this case, there is sufficient matter charged in this declaration to put the defendant to his plea; and that a jury, under the evidence, and a proper charge from the Court, as to the general principles upon which the responsibility of attorneys is based, and the practice of the bar, in the conducting of suits, is the proper tribunal to settle the defendant's liability.

The judgment must, therefore, be reversed, and the cause remanded.

- HOGG *versus* DORRAH.

To say of a member of the Legislature, in reference to the future discharge of his public functions, that " he is a corrupt old tory," held, not to be actionable *per se*.

Words, charged as slanderous, are to be construed neither in their most harsh, nor innocent sense; but, in their plain and common acceptation, and according to their popular use, and obvious import.

The principle is well settled, that words may be actionable, if uttered against officers, or others in public stations of trust or profit, which would not be so, if spoken against common individuals.

But, words to be actionable, if uttered against official persons, must relate to past conduct, implying criminality or moral turpitude, and not to the prospect of future misconduct in office.

Seem, that if there be any exception to this rule, it is in the case of clergymen.

This was an action of slander, instituted in the Circuit Court of Tuskaloosa, by the plaintiff, Hogg. The declaration charged the defendant, in three counts, with having uttered of him, the plaintiff, (he being a member of the Legislature, elect from the county of Tuskaloosa,) these following defamatory words, to wit :

First. " He is a corrupt old tory."

Second. " He is corrupt."

Third. " Keep a strict watch on him, he is a corrupt old tory."

Each count in the declaration, contained *inuendoes*, that the words were spoken by the defendant, in reference to the station of the plaintiff, then held by him, and that they related to the discharge of his duties as a member of the Legislature.

To the several counts in the plaintiff's declaration, the defendant filed a demurrer, which the Circuit Court sustained, and rendered judgment for the defendant.

To reverse this judgment, the plaintiff brought the case into this Court by writ of error,

STEWART, for Plaintiff.—I do not rely, of course, on any thing like the principles of the law of *scandalum magnatum*. A man's office, in this country, does not elevate him above his fellow-citizens, so as to make an offence against him greater than an offence against others, merely on the ground of his exalted character: but a man in office is liable to peculiar injuries, to which others are not liable; and when he is thus injured, he has a right to redress. It is slander to charge a man in office with principles inconsistent with his office.—2 *Esp. N. P.* 496. This is the class of slanderous words complained of in the declaration. The office of legislator, or member of the Legislature of Alabama, is not merely an office of honor, but an office of profit also: and if injured in that office, he may sustain loss: if such a one be corrupt, he is liable to be expelled. The offence charged has a technical meaning, when applied to a man in office. If the charge be believed, it may not only subject him to pecuniary loss—not only make him liable to expulsion—not only prevent his promotion, but it will affect his moral standing, and dishonor him.

These words also come under the rule of words, spoken against a man in some trade or profession. If the charge be credited, that a man in office is corrupt, he will at once, or ought to be, excluded from office.

In offices of profit, words which import want of ability, are, by all the authorities, actionable. Indeed, either kind of imputation, that is against the ability or integrity, is by the better opinion, actionable, whether the office be merely confidential or lucrative.—*Starkie on Slander*, 100, *et seq.*

Words calculated to injure a man in his office, it is laid down, though not spoken in reference to the

office, are actionable : as to say of a Bishop, "he is a wicked man," or to call an attorney "a cozening knave." Words are to be considered according to the condition of him of whom they are spoken ; for his liability to be injured depends on that condition. These words are clearly actionable. The authorities have gone much farther.

The term "*tory*," in this country, is equivalent to *traitor*. A tory is an enemy to his country. It is not understood in this country, as it is in England, where it means an adherent to a particular political party, who are friends of monarchy and the church. Never was it used in the sense in which it has been used in very late times, in this country, since the commencement of this suit. It was meant as it is generally understood among the people, that is to say a traitor, an enemy to his country.

STEWART cited *Mass. Rep.* 248—7 *Johns. Rep.* 359. 5 *Binney's Rep.* 221—1 *ibid*, 184—1 *Johns. Cas.* 129. 7 *Johnson*, 264.

ELLIS, *contra*.—Much of the law referred to by counsel, is not applicable to the present case. It is admitted that these words would not be actionable, if spoken of a private individual: then, the question arises, whether they can be made actionable by the office of a legislator. The general rule is, that if the party would be liable to be criminally punished, for the offence, if established, then the words are actionable in themselves.—5 *Johnson's Reports*, 191—*Minor's Reports*, 94, 140.

I assume the position, that Hogg did not hold an office, within the meaning of the Constitution. The declaration here, shows that the plaintiff only claims for damages on account of his holding the office of a member of the Legislature. The two first counts

make the charge as an injury done to him, in office : the last, does not aver the office directly ; but as the words are not actionable when spoken against a private individual, the count is demurrable for that reason. In the first two counts, the plaintiff is said to be subjected to all the pains and penalties to which those are subject, who are guilty of corruption in office. What are these ? Can a member of the Legislature be impeached ? No. Is he indictable for a misdemeanor, for corruption in office ? I know no authority for it. If the danger was expulsion, it should have been stated. If it was deprivation of promotion, that should have been stated.

But, members of the Legislature are not officers. The Constitution says, they shall "*serve*," &c., not, shall *hold the office*. Of certain persons, it says, they shall not have a seat in either House of the General Assembly, *or be eligible to any office of trust or profit* : why the distinction, if members of the Legislature hold an office of trust or profit ?—3d Art. 2d sec. *Constitution of Alabama—same Art. 24, 25, and 27th sections.*

When the Constitution comes to speak of the Executive Department, of the Governor, Secretary of State, Sheriff, &c. the word *office* is employed—4th Article of the Constitution, 14th section. So also, of the Judicial department—the *office* of Justice of the Peace, the Judge's *office*, the *office* of Attorney General, &c.—Section 18.

Officers, in the constitutional sense, would be liable to impeachment, also to indictment for corruption in office : words like these would, perhaps, be actionable against them for this reason, but not against members of the Legislature, who are not so liable.

Much of the doctrine of the English Law on this subject, is founded on the statutes giving damages for

scundalum magnatum ; but we have no such law. The two rules laid down in the case of *Onslow vs. Horn*, (3 *Wilson* 177,) are, 1st. Slander must be where the words impute a crime. 2d. Where the words are against a person holding an office of profit, and calculated to injure him therein—or the same as to a profession.

It is not fair to reason by analogy, from members of Parliament to our members of the Legislature. Liberty of speech is guaranteed in this country. Members of Parliament hold their place for seven years : here, it is a temporary trust—held only for one year. It is held, for instance, that to say of a member of Parliament, "He is a papist," is actionable. This would surely not be law here, in reference to our Legislature.

But, I hold that under our form of government, no action will lie for words like these. No adjudged case can be found where an action has been maintained for a charge of corruption against a member of the Legislature. Nor do I know of any case in England since that of *Onslow vs. Horn*, and there the judgment was for the defendant. This action, I insist, cannot be supported.

By Mr. Chief-Justice SAFFOLD :

Hogg instituted an action of Slander, in the Circuit Court of Tuscaloosa county, against the defendant, Dorrah.

The declaration contains three counts.

1. The first recites the plaintiff having been duly elected a representative of the county ; had taken upon himself the duties of his office ; had taken the oath prescribed ; had been admitted to his seat ; and was, at the time, in the discharge of the duties of said office, when the defendant well knowing

the premises, and intending, &c. to cause it to be believed, that the plaintiff was guilty of corruption in office, and to subject him to the punishment provided by law for said offence, in a discourse held with one Cunningham, in the hearing of divers others, and in relation to the office and trust, which the plaintiff then held as aforesaid, falsely, slanderously, &c. uttered, and proclaimed of him, the plaintiff, as follows—that “he is a corrupt old tory;” (meaning thereby, that he, the plaintiff, was guilty of corruption in the discharge of his said public function and trust.)

2. In the second count, that “he is corrupt.”

3. In the third count, that the defendant said to Cunningham, who was also a member of the Legislature, in reference to the plaintiff, and his said public function, “keep a strict watch on him, he is a corrupt old tory;” with *innuendo* to the second and third counts, similar to that in the first.

To each of the counts in the declaration, the defendant demurred. The Circuit Court sustained the demurrer, and rendered judgment for the defendant, for the costs.

This judgment on demurrer, is the cause assigned for error.

Thus, the question is presented, whether the words charged, under the circumstances, and in the manner of the imputation, are actionable in themselves, or could only be rendered so by a *per quod* averment. As no special damages are alleged—unless the words are actionable in themselves, the demurrer was properly sustained.

What is the nature of the imputation against the plaintiff, alleged in the declaration? It is necessary to determine the true import of the words complained of, in order to bring them to the test of other cases. The *innuendo*, it must be recollected, cannot alter, va-

ry, or extend, the meaning of the words uttered. It can only furnish a technical definition or explanation of an offence imputed by the words actually spoken. The position is equally true, that in actions of this kind, according to the improved doctrine of the law, the words charged as slanderous, are not to be construed either in their most harsh and offensive, nor in their most mild, and innocent, sense, as, at different periods in the history of jurisprudence, has been holden; but are to be understood by courts and juries, as by the rest of society, in their plain and common acceptation; in other words, according to their popular use, and obvious import.

Allowing to the plaintiff all the benefit that can be derived from the fact, of his having been a member of the Legislature at the time, and that the words were spoken of him in reference to the discharge of his public functions, as such, what is the offence imputed to him? In the first and third counts, it is no other than that he was a *tory* of an obnoxious description. It is not even supposed, by the argument of counsel, that the words were intended to impute that kind of *toryism*, which has long distinguished one of the political parties in England, or that which was applicable to one portion of the American community during our revolutionary struggle, and for some time afterwards. Nor is it contended, if such were the intention, that the words, (if ever so,) would be actionable at the present day. But, it is insisted, that by a rational intendment, the meaning must have been, that the plaintiff was a traitor or some kind of enemy to his country. According to my view, this would be the most rigid and offensive acceptation that the words could possibly bear; and that we have no more authority thus to construe them, than in the very mild sense suggested by the defendant's coun-

sel—that it may only have been intended to impute to the plaintiff the advocacy of a particular candidate for the Presidency, to whom the defendant was opposed. But, I must concede, that neither appears to me to be the natural and common acceptation of the term: also, that when the charge was made, or at the present day, in this State, and after the various uses that have been made of the word, there is difficulty in ascribing to it any definite meaning. I think, however, it may be assumed, that if any thing more than general scurrility was meant, the epithet was intended to impute some *political creed or heresy*, which the plaintiff considered obnoxious; and that the other qualities imputed, by the adjective ‘corrupt,’ represented the plaintiff as *one possessing a heart of general depravity*; and that the accompanying request, that he should be watched, implied an opinion that he was capable of disingenuousness, or artifice, to effect his sinister purposes. The joint application of the epithets *corrupt* and *tory*, has a tendency rather to qualify and limit, than to extend the former, by confining it to *political* feelings or sentiments.

The second count, however, charges the imputation of corruption in the plaintiff, without any special application; the effect of which, I would understand to be, that the plaintiff possessed a depraved heart, rendering him capable of vicious or corrupt acts generally.

Then, the question recurs, whether words, imputing to the plaintiff, while a member of the Legislature, and in reference to the future discharge of his public functions, the character of vice or depravity; or of holding, undefined, obnoxious political tenets; *are in themselves actionable*.

It is considered material, that the words charged, have no special reference to any *particular vote, or*

other act done; nor even to the plaintiff's *past conduct as a member*—that the allusion is to his corrupt and tory character in *anticipation* of his improper conduct. The principle is well settled, that various charges, when made against officers, or others, in public stations of trust or profit, may be actionable, which would not be, if uttered against common individuals. The reason is, that persons in office, or such other stations, may loose their employment, and the profit or confidence committed therewith; or may be subject to prosecution and punishment for malfeasance, or other offences; yet there are some general principles applicable to all actions of slander, to which reference must be had, in determining the effect of these words.

² Esp. Ni. Pr.
496, 7.

It is said, in an authority,* read in argument by the plaintiff's counsel, "that the words must charge *a fact to have been committed*; for to charge *a man with bad or evil intentions, is not sufficient*:" as, where the defendant said of the plaintiff, "he is a brawler and quarreller, and gave his champion counsel to kill me, and then fly the country:" these words were adjudged not to be actionable; for they charged no *fact committed*, and the *purposes* or *intentions* of a man, without action, are not punishable at law. So, where the words were, "He is a troublesome fellow, and I doubt not to see him indicted at the next assizes, for *sheep stealing*;" these words were adjudged not to be actionable, as not charging the party with any *fact committed*.

² Esp. Ni. Pr.
499.

It is also said, by the same authority,* in reference to words constituting *scandalum magnatum*, that imputations against persons in office, dignity, trust, and profit, may be actionable, which would not be held so, in case of a common person: as where it was said of the *Marquis of Dorchester*, "My Lord is no more to

to be valued than the dog which lies there ;" this was considered actionable. Other authorities to be noticed, will perhaps show, that *Dorchester's* case can not be regarded as law, unless under circumstances different from those presented ; and will further illustrate the accuracy of another principle, given in connection with the same, that words, charging *bad intentions* merely, are actionable in the case of *public persons* or *magistrates*. The further remarks of the same author, appear scarcely reconcilable with the above : " That where the words do not charge the person in such *trust* or *office*, with any breach of his duty, or oath ; with any crime or misdemeanor, whereby he has suffered any temporal loss in fortune, office, or in any other way whatsoever, but are spoken *as matter of opinion* as to the person's conduct, such words are not actionable."

I regard the case of *Onslow vs. Horn*,* as direct authority in this case. For the present purpose, it is sufficient to notice the concluding remarks of the *Chief Justice*, in delivering the opinion of the Court. He says, " the words do not relate to *Mr. Onslow's past conduct in Parliament* : they do not charge him with any breach of his duty, his oath, or any crime or misdemeanor, whereby he has suffered any temporal loss, in fortune, office, or in any way whatever. There is no occasion to say any thing concerning any future presumptive contingent damages, which Mr. Onslow may possibly sustain at some future time, (no body knows when) by reason of Mr. Horne's reflection upon him. I know of no case, whereon an action for words was grounded upon eventual damages, which may possibly happen to a man in a future situation, notwithstanding what the Chief Justice throws out in 2 *Vent.* 266, where he is made to say, ' that where a man had been in an office of trust, to

* Wilson 177.

say, he behaved himself *corruptly* in it, as it imported great scandal, so it might prevent his coming into *that* or the like office again, and therefore, was actionable.' I think the Chief Justice went too far." Such is the language of the Court, in *Onslow's* case. The Chief Justice there, also said, he thought his brother *Leigh* went a little too far, when he said the words imported that Mr. Onslow would betray his trust: "We think they mean no more, than Mr. Horne *was of opinion, Mr. Onslow would break his word*; but to say, *he has broke his word*, is not actionable—a *fortiori*, these words are not actionable." The particular words uttered against Onslow, are immaterial to our purpose. The principle of the decision, is, that the words, to be actionable, must relate to the plaintiff's *past* conduct in his office, or public duty; must charge an actual breach of duty, or of oath, or the commission of some crime or misdemeanor; that an action for words, is not sustainable for eventual or contingent damages, which may possibly happen to a man in a future situation; nor is the expression of an opinion, respecting another's *inclinations* or *intentions*, a ground of action.

The principle mainly relied on, in support of this action, is, that the words were spoken of the plaintiff, in reference to his motives and conduct *in office*. The injury is so charged in the declaration; but, as before mentioned, without any averment of special damages, or of any *colloquium*, applying the imputation to any vote given, or other act committed, in the discharge of the public trust; but, with general reference to his corrupt disposition, and obnoxious character, while a member, and employed as such. Except in relation to the plaintiff's alleged *toryism*, which I have attempted to shew is not *actionable*, what distinction can be drawn between the import of this

charge, and those of *liar, scoundrel, villain, &c.*—Charges of the latter description, are generally considered as indicating rather the angry, reckless temper of the speaker, than the turpitude of him of whom they are spoken. It is well settled, that such imputations, when made in reference to common persons, are not actionable; nor has any case been found, of good authority, in which words of similar import, have been so held, when spoken of one in official station, or any honorary employment or trust. It is not believed that a member of the Legislature could be subjected to conviction on impeachment for any cause, of the nature of that imputed to the plaintiff in this action, even if he could for any cause whatever, which is not admitted. It is true, a member of the Legislature is subject to expulsion, by the body itself; but it cannot, for a moment, be apprehended, that the charge imputed to this plaintiff, if admitted to be true, would authorise his expulsion. An insuperable objection to this course, would be, that no crime or misdemeanor, or any particular act of moral turpitude, was charged; nor any particular allusion made to the plaintiff's *past* deportment as a member; that an apprehension or opinion only was expressed, from his disposition and character, that he would act improperly.

In *Starkie on Slander*, (110) it is said, "that to impute want of integrity to any person, who holds an office of trust or profit, is actionable." It is impossible to determine the force and extent of such general propositions, without particular reference to the proofs and illustrations given to sustain them; this is also necessary to test their authority. Of the cases given in support of the above proposition, one was, that it had been said of a Judge, that "*his sentence had been corruptly given.*" Another, where it was said of a

Justice of the Peace, "I have often been with him for justice, but could never get any thing at his hands but injustice." And another, where the words were, "He covereth and hideth felonies, and is not worthy to be a Justice of the Peace."

The distinction between each of these cases, and the one before us, is most obvious. In all the cases cited, the words used, clearly imputed corruption or turpitude, in reference to particular official acts previously committed.

The same writer, in continuation, lays down another proposition in still broader terms; which is, that "where a person holds an office or situation, in which great trust and confidence must be reposed in him, words impeaching his integrity generally, and without express reference to his office, are actionable; since they must necessarily attach to him in his particular character, and virtually represent him as unfit to hold that office or situation." One of the examples given to sustain this position, is a case in which it had been said of a Bishop, "He is a wicked man." This was held to be actionable; and appears to be the strongest case referred to, of which there were many. All the rest, according to their natural import, or the construction placed upon them by the courts or juries, had reference to some particular misconduct in office, or to some breach, or violation of, or incapacity for, professional duty, and pointed to acts already done—not, as in this case, to a disposition for future mischief.

The case of the Bishop, appears to rest on a principle peculiarly applicable to clergymen—that whatever tends to destroy public confidence in their moral virtue, and christian purity, must deprive them of that respect and veneration, which is indispensable to the success of their profession. On this principle, it

is held, in the United States, as well as in England, that to charge a minister with *drunkenness*, is actionable without laying a *colloquium* of his office or profession, and without proof of special damages—(*McMillan vs. Birch—Shaddock v. Briggs.*^b) In the case last referred to, Chief Justice Parker concludes the opinion of that Court, thus: “a minister of the Gospel is separated from the world by his public ordination, and carries with him constantly, whether in or out of the pulpit, superior obligations to exhibit, in his whole deportment, the purity of that religion, which he professes to teach. He is as much in office, when retired to the bosom of his family, as when employed in public duties; and his example in the practice of all moral virtues, and particularly of temperance, is not the least of the duties incurred by his profession.”

But the law is conceived to be different in respect to other persons; even as to those in *offices of trust and profit*, or other public stations. It appears, from the references already made, that there is at least, a shade of distinction: that in the latter cases, the imputation may point to some particular misconduct previously acted, in violation of official or professional duty. The principle adopted in *Brooker vs. Coffin*,^c is not strictly applicable to the case of officers, so as to require to be actionable, a charge, which, if true, will subject the party to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment: yet, by analogy, it is entitled to its influence in requiring that the actionable words shall point to the particular misconduct, imputed as criminal or vicious.

The case of *Oakley vs. Farrington*,^d is more in point. The plaintiff complained as a Justice of the Peace, and charged the slanderous words to have

been spoken of him in relation to his office. The words were, "Squire Oakley is a damned rogue." It did not appear from any circumstance, that the words were spoken of the plaintiff in his official capacity. The Court ruled, that the words spoken of a common person, would not be actionable; and although they were spoken of a magistrate, as they had no relation to his official character or conduct, they were no more actionable, than if he had not been in office.

*7 Johns. Rep.
359.

The case of *Lindsey vs. Smith*,* further illustrates the true principle. In that case also, the plaintiff was a Justice of the Peace, and declared for an injury as such, in reference to a trial had before him between the defendant, and one Abner Wood. He alleged, in substance, that the defendant said of him, "he had been *feed by Wood*, and that he, the defendant could do nothing, when the magistrate was in that way against him." A verdict having been obtained for the plaintiff, the defendant moved in arrest of judgment, on the ground, mainly, that the *colloquium* did not state that the words were spoken concerning the *cause*, and the *plaintiff's conduct* in relation to it. The Court remarked, that the slanderous intent and *application* of the words had been established by the verdict; that the *innuendo* could not supply the place of the *colloquium*, but that there was the competent *colloquium* to give *point* and application to the words if found, as the jury must have found them to have been spoken, with a scandalous and malicious intent.

These two latter cases fully sustain the principle of those previously referred to, that actionable words, even in reference to officers, and all public functionaries, (perhaps clergymen excepted,) must point to previous official misconduct, implying criminality or moral turpitude. This restriction must be observed, or

a boundless field of litigation would open before us ; and thus far only, consistent with the genius of our government, can the licentious use of words, be checked and punished.

The province of the jury, in deciding, whether or not, there is cause of action, is only to determine the effect of the evidence, and the common acceptation of the words charged, when, from the form of the expression, their import is equivocal. In other respects, it is a question of law, whether the imputation be actionable.

From this view of the case, we are of opinion, the judgment below, must be affirmed.

STARNES & CO. *versus* PIERCE.

In actions against officers, for failure to return process at a particular day, the Courts are privileged to hear any matter of equity in excuse for the failure— And where the amount involved is under twenty dollars, such excuse may be shewn by the oath of the officer.

This action was brought before a Justice of the Peace, in the county of Jefferson, to recover of the defendant, the sum of seventeen dollars and eighty four cents. The defendant was a constable, and the cause of action, was, his failure to return process on an attachment, in favor of the plaintiffs. The Justice having rendered judgment in favor of the plaintiffs, the case was taken, by appeal, to the Circuit Court. The Court below, permitted the defendant to shew, by his own oath, that he had a sufficient excuse for his failure to return the process ; and the cause was reversed. The plaintiff, thereupon, took a writ of error.

ELLIS, for Plaintiff—Contended, that on failure to comply with the statute, the liability of the constable was fixed ; and if not so, still the excuse offered was no sufficient exculpation. The party should be held strictly responsible, according to law. He does not shew any excuse for the delay. He excuses himself because another attachment came to his hands on the same day ; and he could not make enough to satisfy both. The order of sale in question, was first received, though the other was on the same day ; and the oldest order should have been first complied with. At any rate, the order should have been returned in due time, according to law. The contention about which attachment should be first satisfied, was an additional reason for making due return, as there was a probability presented to him, that he would be made liable if he committed a failure.

PECK, *contra*.—This is, in fact, an action of debt against the constable, for not paying over money, and not properly a motion for failing to return the order of sale. There was no intentional wrong, and the Court very properly made an equitable adjustment of the matter. The Court heard all the circumstances on both sides, and decided in favor of the constable. The plaintiff only excepted to the right of the Court to go into the equitable circumstances, and not to the sufficiency of the excuse.

By Mr. Justice HITCHCOCK :

The plaintiffs in error, brought their action before a Justice of the Peace for Jefferson county, against the defendant, who was a constable, for failing to return an order of sale, on a judgment in favor of the plaintiffs, against one Shoffeit, on an attachment, and for failing to return the money made on said sale, to

the magistrate who issued the order. The debt claimed, is seventeen dollars and eighty four cents. Judgment was rendered for the plaintiffs, by the magistrate ; from which there was an appeal to the Circuit Court of said county ; where the judgment was reversed, and the case is brought here by writ of error.

At the trial before the Circuit Court, a bill of exceptions was taken, which presents the matters relied on here, to sustain the writ of error. The sum being under twenty dollars, the case was tried by the Judge without pleadings or a jury.

The failure to return the order was proved by the magistrate. The Court determined to hear evidence going to show an excuse on the part of the constable, for failing to return the order, and for that purpose, permitted the constable to be sworn, and received his statement on oath. To the opinion of the Court, *determining to hear the circumstances of excuse, the plaintiff excepted.*

It is contended, that the Court erred,

1st. In determining to hear any evidence of an excuse ; and,

2d. In deciding that the matter of excuse was sufficient.

As to the first point, it has always been decided, that the Court has the power to hear any matter of equity, in excuse for an officer's not returning an execution, or any other process required to be returned at a particular day ; and when the party has failed to make his excuse at law, a bill in chancery has been allowed to enjoin a judgment obtained. The reasonableness of this decision is apparent ; and to say that an officer should be made liable, at all events, for every failure to return process at a particular day, without giving him any right to excuse his default, would be subversive of the first principles of justice.

There is, therefore, no error in the first assignment.

The second assignment is not presented by the bill of exceptions. The sufficiency of the excuse was not drawn in question, directly, by any thing therein contained, and this Court is not authorised to revise the decision of the Court upon that point. A bill of exceptions does not draw the whole matter into examination; but only the point to which it is taken; and the party must lay his finger on the points which arise, either in admitting or refusing evidence or matter of law, arising from a fact denied, in which he is overruled by the Court.* Here, the party was overruled in his exception to the power of the Court, to receive evidence of any excuse for failing to return the order of sale. But no question is raised as to the sufficiency of that evidence.

*8 Johns. Rep.
496, 3d ed.

The judgment must, therefore, be affirmed.

THE MAYOR AND ALDERMEN OF TUSKALOOSA vs. WRIGHT.

The books of a Corporation, are evidence against the Corporation, and between the members thereof, but not in their favor, in a suit brought against the body, by a stranger.

Ex members of a town corporation, are *ex necessitate*, competent witnesses in a suit by a stranger, against the body.

This case originated in an action of *assumpsit*, brought against the plaintiffs in error, in the Circuit Court of Tuscaloosa. The plaintiff declared, for a certain sum of money, allowed to him by resolution of the corporate authorities of the town of Tuscaloosa, in settlement of his accounts as marshal. The books of the corporation were produced in support of

the claim, by which it appeared, that the sum demanded had been allowed to the plaintiff, as charged in his declaration. The defendants contended, that the resolution had been passed in mistake, and offered to shew by the same books, the passage of a subsequent resolution of the Board of Aldermen, rescinding the first, but the Court below rejected the last resolution offered by the defendants.

The defendants then produced certain of the ex-members of the corporation, who had been in office at the time when the resolutions were passed, whom the Court excluded. Judgment having been had in favor of the plaintiff, the case was brought into this Court by writ of error.

WILSON, for Plaintiff.—The question here, arises, can the marshal of the town (Wright,) subject the corporation to debt by means of their own books, without permitting all that appears on the books, with reference to the same subject, to go to the jury? I contend that this is not allowable. It is taking a defendant's own statement against himself, and at the same time garbling that statement. The book introduced in evidence, was the property of the corporation; and if they may be forced out of the hands of the owners, to be used as evidence against them, all that they disclose with reference to the same subject matter, should go together to the jury. Suffering part to be read, and excluding the rest, was like introducing, in an action at law, the defendant's answer in chancery, and reading part of it against him, without permitting him to read the rest.

The plaintiff below in this case, had a right to prove his account against the corporation, without resorting to their book, but as he chose to resort to it, he thereby entitled the corporation to use it also on

the same subject. To admit the first, and to exclude the second, would be making an unfair use of the book of the corporation. As well might an individual, with whom I had pecuniary dealings, come into my office, take up some of my memorandums in which I had entered a charge against myself, and hold me accountable to that amount, without permitting another memorandum to be used in my favor, of a like private nature, also entered by myself, going to show that the debt so evidenced was paid off and discharged. It is not that we would prove by the book of the corporation, that Wright's account was false, but that the debt was removed by payment and set-off.

In regard to the second point: I contend that the Court erred in rejecting the evidence of John Owen, and others, because they had been members of the corporation at the time of these transactions. There is a distinction between a private and public corporation. The members of the former may have an interest that will render them incompetent to give testimony; but it is different with the others. There, the interest, if any, is slight—of a public character, and so remote, that it is no objection. Such is the corporation in this case: and the interest of the members belonging to it, is not such as will justify their exclusion from giving testimony. The inhabitants of a town have an interest in its welfare and prosperity; but it is not such an interest as will render them incompetent witnesses in a suit, in which the corporate authorities of the town become a party. Commoners, in England, were not good witnesses; for, if the common were extended or contracted, their private rights were thereby affected.

ELLIS, *contra*.—Wright declared in one of the counts of his declaration on an *insimul computassent*

assumpsit. This record, introduced on the part of the plaintiff, sustains this count. It shows the accounting together, as charged. Wright was then present. Orders made at other times, when he was not present, are not admissible. It has been compared to introducing the admissions of a man against him. What then? Because you prove what a man has admitted, may he prove every thing that he has said on the subject? Certainly not. He can only prove what he said at the same time he made the admissions—not what he said three days afterwards, the other party not being present. The general rule applicable to this case, is, that the books of a corporation are evidence against them, not for them.

When the subsequent orders of the corporation were rejected by the Court, it was attempted to introduce these same men who made those orders, to impeach the former settlement. It was, in effect introducing a defendant to impeach his own settlement. Such testimony is not competent. These subsequent orders too, condemned the first settlement as wrong. If they had made a wrong settlement, they were responsible for the error. Here was a direct interest. They were interested to defeat this suit, and thus to free themselves from legal responsibility.

In regard to the competency of members of a corporation, as witnesses in behalf of that corporation, I hold the rule to be, that they are inadmissible, unless it can be made appear, that it is from necessity that they are introduced. The case may be assimilated to that of rated parishioners: these, being bound to pay the rates assessed for the poor of the parish, are not competent witnesses to prove a donation to the parish.—5 Term R. 174. In the present case there is an obvious interest, All the members of the corporation are, interested in being released from the pay-

ment of the amount due the plaintiff; and there does not appear to be any necessity for the introduction of these men as witnesses.

By Mr. Justice HITCHCOCK :

This was an action of *assumpsit*, brought by the defendant in error against the corporate authorities of the town of Tuskaloosa, to recover the sum of one hundred and eighty dollars and forty three cents, which he claimed ; it being the amount allowed him by a resolution of the Board of Mayor and Aldermen, upon a final settlement of his accounts as marshal of the town, and which was dated the 5th of September, 1831. The plaintiff read to the jury the entry of the proceedings of the corporation, as it appeared from the record book of their proceedings. The defendant then offered to read from the same record book, the proceedings of the board upon a subsequent day, to wit, the 8th September, 1831, rescinding the first resolution, re-stating his account, and reducing the amount. It appears that the plaintiff was present at the meeting of the board on the 5th, when his account was allowed, and assented to the settlement ; but that all the subsequent proceedings were had in his absence, and against his consent.

The Court refused to permit the subsequent proceedings to be read to the jury. The defendant then offered as witnesses to establish their defence, and to prove they were not indebted to the plaintiff, sundry witnesses, who, it appeared, were the mayor and aldermen of the town at the time of the above stated transactions, but who were not in office at the time they were offered as witnesses. The Court excluded their testimony, and would not permit them to be sworn. To the exclusion of the above testimony, and the rejection of the witnesses, a bill of excep-

tions was taken, and which is assigned for error here.

It is laid down in 1 *Starkie on Evidence*, (292,) that the books of a corporation, containing a register of their public acts, are evidence between the members of the body, or against the body, for they contain the rules and regulations to which they are all subject, and to which all are privy: but, they are not evidence for the corporation against a stranger. This, as a general rule, would undoubtedly apply to this case. But the plaintiff's counsel contends, that the plaintiff below, having introduced the books, has thereby made them evidence, as well for, as against the corporation, so far as they relate to the subject matter in controversy, on the ground that the admissions of a party must all be taken together.

The introduction of the books, by the plaintiff below, was confined to the establishment of a contract between him and the corporation, for such the resolution of the board must be held to be. It was a distinct admission of a debt, upon a subject properly within their control, and about which they could bind the body, and the effect of which they could not impair, by any subsequent revocation *by themselves*, unaccompanied with the assent of the plaintiff below. The introduction of it was, therefore properly rejected.

But, in the exclusion of the witnesses, the Court conceive there was error. They were not parties to the suit, at the time they were offered as witnesses, and it now seems to be admitted, that the inhabitants of corporations and *quasi* corporations, such as counties, towns, parishes, cities, &c. though they may be collectively interested in a suit, are nevertheless, competent witnesses. This is from the necessity of the case.* These witnesses were not rejected on the ground that they were incompetent to impeach the

*1 Day, 35—5
Cowen 416, 1
N. Hamp. R.
273, 1 Johns.
486, and other
cases cited by
Starkie, 145.

settlement made on the 5th September, but because they were members of the board at the time of the settlement, and because it must be inferred they were inhabitants of the town when they were called to testify. They are considered by the Court as competent witnesses, and that their testimony should have been received, so far as it might be applicable to the issue before the Court, under the ordinary rules of evidence. For this error, the cause must be reversed and remanded.

Porter.
2d 236
97 568

BURKE *versus* ADKINS, *et uz.*

Debt, suggesting a *devastavit*, is maintainable, on a judgment by default, obtained against the representatives of an estate; either before, or after the issuance of a *fi. fa.*

Burke, plaintiff in error, having obtained a judgment by default, in the Circuit Court of Shelby, against the estate of one Porter, brought his action of debt, suggesting a *devastavit* against the present defendants, representatives of the same. The declaration of the plaintiff was demurred to, and judgment was rendered by the Court, in favor of the defendants.

The only question presented in this Court, was, whether debt suggesting a *devastavit* would lie against the administrators, *de bonis propriis*, without an averment of the issuance of a *fi. fa.* and the return of *nulla bona* thereto, on the judgment obtained against the estate.

MOODY and ELLIS for Plaintiff—cited 2 *Chitty's Pl.* 484, '5, 1 *Chitty's Pl.* 47.

PECK, *contra*.—1 *Coven*, 734, 736, 739—1 *Johns. Cas.* 276.

By Mr. Justice THORNTON:

This was an action of debt, suggesting a *devastavit*, in the Circuit Court of Shelby county, brought by the plaintiff in error against the defendants, upon a judgment by default, before that time rendered, in favor of the plaintiff, against Mary M. Porter, (now the wife of the defendant Adkins,) and one McKinney, as administratrix and administrator of Mitchell A. Porter, deceased.

The declaration contains two counts, differing only in this, that in the first, there is an averment of the issuance of a *fi. fa.* upon the judgment, and a return thereon of *nulla bona*, which is omitted in the second count. There was a general demurrer to both counts, and judgment pronounced in favor of the defendants; which is now here assigned for error. Both these counts aver a judgment to have been had by default, against the representatives of the intestate, and a *devastavit* committed, to the value of the debt demanded. That the facts, of assets received, and wasted by the representatives, constitute a liability to a recovery, *de bonis propriis*, is not controverted; nor is it denied, that the first named of those facts, is established by the judgment by default. The propriety of the judgment below, however, is endeavored to be maintained, by contending, that the averment of a *fi. fa.* and return of *nulla bona*, is a necessary one; which being omitted altogether in the last count, renders that defective; and not being properly averred, or sufficient in itself, as set forth in the first, vitiates also that count. Now, with regard to the first count, taking it for granted that those allegations are necessary, I think they are alleged with sufficient legal effect. But,

from an examination of the authorities and precedents, I find that the action is maintainable, before any *fi. fa.* issued on the judgment against the representatives.

A leading case on this head of the law, is *Wheat-¹ Saund. 216. hy vs. Lane,*^a where the declaration was demurred to expressly for that supposed defect, and held to be sufficient. In the note to that case, by *Sergeant Williams*, it is explicitly declared, that either mode is good—that is, that the action will lie before any execution issued on the judgment, or after execution issued; but, that it is usual, first to sue out a *feri facias* on the judgment, and upon the sheriff's return of *nulla bona*, to bring the action, and state the judgment, the writ and return in the declaration, and on the trial, the record of the judgment, the *fi. fa.* and the return, will be sufficient evidence to prove the

^a1 Saund. 219, case.^b Upon principle, this would seem clearly correct, and the only reason for averring the judgment itself, is, *ita lex scripta est*; for, according to the well settled rules of pleading, facts themselves, and not the evidence of those facts, constitute the pleadings.—

Now, this action of *devastavit*, is founded on the fact, of assets received by the representatives, of which the judgment is only evidence; and the further fact of waste, of which, though the return of *nulla bona* to a *fi. fa.*, when one has issued, is demonstrative evidence; yet the fact can be established, if no such *fi. fa.* has issued, by other, equally satisfactory proof. From this view of the case, both of the counts are good; and therefore, the judgment rendered against the plaintiff on demurrer, must be reversed, and the cause remanded.

RICHARDSON *versus* WILLIAMS.

The rate of interest in any one of the United States, is not a matter which the Courts *ex officio*, can notice, but is a question of fact, to be ascertained by a jury. The Courts are not bound judicially to know, that, an instrument declared on, as made "at Virginia, to wit, in Greene county," was executed in the State of Virginia—and where nothing is shewn by which to infer that the State of Virginia was meant, it will be presumed that "Virginia" was some place in the county, where the action was brought.

Debt was commenced by Williams, in Greene Circuit Court, on a sealed note. The plaintiff declared on the instrument, averring the same to be made at "Virginia, to wit, in Greene county." After judgment by default, for want of plea, Richardson took a writ of error to this Court. The question here, among other immaterial assignments of error, was, whether the Court below erred in rendering judgment for the plaintiff, without a jury, as the instrument declared on was executed in the State of Virginia; and the interest of that State could not be computed without a jury having first ascertained the rate, there allowed by law.

STEWART, for Plaintiff.—ELLIS, *contra*.

By Mr. Chief-Justice SAFFOLD :

This suit was instituted by Williams, in Greene county. The action is debt, on a sealed instrument, for three hundred dollars, which, from the indorsement on the writ, appears to have been credited with fifty dollars, in 1820. The declaration is in the usual form, averring an indebtedness to the amount of the bond: thus—"For that whereas, the defendant, Richardson, and one Paulin Anderson," (against whom this suit is not brought,) "heretofore, to-wit, on the

22d day of March, 1819, at Virginia, to wit, in Greene county, by their certain writing obligatory, sealed with their seals, and now shewn to the Court here," &c. acknowledged themselves indebted in the said sum of money, "and if not punctually paid, to carry interest from the date." The record further shews, that at the trial term, the parties came by their attorneys, and the defendant saying nothing in bar, judgment was rendered against him. It also appears that the writ had been duly executed.

Richardson, the defendant below, having sued out this writ of error, assigns as causes, various objections to the declaration and judgment.

1st. That the debt declared for, and that recovered, are variant.

3d. The bond is not made part of the record, nor is oyer given of it, so that the Court can know if judgment was given for the proper amount.

4th. The judgment is for too much.

6th. Interest is recovered by way of penalty.

With respect to these four assignments, it will suffice to say, no oyer was craved of the bond sued on. The declaration contains the usual *profert in curia*. No discrepancy is perceived between the debt sued for, and that for which the judgment was rendered, unless it be, that the judgment is for less than appears to have been due, of which the plaintiff in error cannot complain. Nor does it appear that interest was computed before the maturity of the debt. The amount is believed not to exceed *six per cent.* from the time appointed for payment until the date of the judgment; from which it results, that if the Court was authorised, under the circumstances, to allow any rate of interest, there was no error on any of the points noticed.

The 5th assignment is, that the plaintiff was dead before the commencement of the suit, which was un-

known to the defendant during the pendency thereof. The opinion of the Court, on this, as a preliminary point, has already been expressed—that the exception cannot prevail in this Court. We think, if the fact be true, which is not admitted by the adverse counsel, it constituted *error in fact*, which might have been resisted in the Court below; and as the record shews nothing of the kind, but implied the contrary, it is an objection which we are not at liberty to notice.

2. The assignment, numbered second, deserves more consideration. It is, that the Court erred, in giving judgment for damages or interest, without a jury, as the bond was made in Virginia, and the Court cannot judicially know what is the rate of interest in that State.

If we are authorised to assume the fact, that the instrument was made in the *State of Virginia*, the exception is well founded in principle, and authority. This Court, as well as others, has frequently decided, that the rate of interest in a different State, is a matter which, the Courts *ex officio*, cannot take notice of; that it is a fact which must be ascertained by a jury. But the question here, is, can the Court judicially know, or assume the fact, that this bond was executed out of this State. The declaration charges, that it was made “at Virginia, to-wit, in the county of Greene,” State of Alabama. The *State of Virginia* is not expressed: the words “at Virginia,” are mentioned in the usual form of laying a *venue* within the jurisdiction; and which, however unnecessary in transitory actions, is a very common mode of declaring.—Then, as the *Virginia* in question, is described, and averred in the declaration to be, a place in the county of Greene, can the Court judicially know the contrary? By what warrant can we say there is not in

that county some district or settlement—some town, hamlet, or villa, known and called “Virginia.”

- *1 Ala. R. 167. In the case of *Garner vs. Tiffany, Wyman & Co.*^a this Court said, where it appeared on oyer that the note sued on was executed at “Fayetteville,” that the Court could not judicially know, that that place was not in this State; on the contrary, was bound, from the description given of it in the declaration, to conclude it was in the county of *Madison*. Though it may appear more natural and customary to name a place “Fayetteville” than “Virginia,” the principle is the same in reference to either. Had the declaration described the contract as having been made in “the State of Virginia,” the principle would have been different; it would have been the same as recognised by this Court, in the case of *Peacock vs. Banks*,^b of *Evans vs. Irvin & Dunlap*,^c and of *Evans vs. Clark*.^d

^a 1 Ala. Rep. 387.

^b Porter's Rep.

1st ed. 390.

^d *ibid.* 383.

Courts may judicially notice the geographical divisions of the Union into separate States, and of their own States into counties; but the *topography* of the country is subject to a different rule. In respect to the latter, the Courts will not judicially know the contrary of facts, implied by the state of the pleadings. In this case, the judgment by *nil dicit*, implied an admission of a contract, in all material respects, such as described in the declaration. This was the doctrine of the Court of King's Bench, in *Deybel's case*.^a—There, the prisoner was confined on a charge of having been found on board a vessel within four leagues of the coast between the *North Foreland* and *Beachey Head*, or within eight leagues of some other part of the coast, in violation of an act of Parliament. The return on the writ of *habeas corpus*, did not state that the vessel was discovered within eight leagues of the coast of the county of *Suffolk*, but within eight leagues of

^a 4 Barn. & Al.

243—5 Searg.

& Lowb. 413.

a place in a part of the coast, called *Suffolk*. The Court held that they could not say, judicially, that there was no place on the coast between the *North Foreland* and *Beachey Head*, which was called *Suffolk*. And as respects an additional averment in the return, that the vessel was discovered within eight leagues of *Orfordness*, in the county of *Suffolk*, they said they could not know whether *Orfordness*, which was averred to be part of the county of *Suffolk*, might not be an isolated part of it, situated on the coast, between the *North Foreland* and *Beachey Head*; and if so, there was nothing on the return to shew that the vessel was discovered within the limits mentioned in the act of Parliament. That the proper course would have been "to have stated negatively, that the vessel was found within eight leagues of a part of the coast of Great Britain, not between the *North Foreland* and *Beachey Head*, to wit, within eight leagues of *Orfordness*, in the county of *Suffolk*."

It is true, on that occasion, the Court held great strictness to be necessary, because the liberty of the party was involved; yet they professed to act on the general principle of judicial cognizance, and said it could not extend to the particular parts of counties, and their local situation.—(See, also, *Henry versus King*.) 2 Barn. & Al.
301.

In this case, a plea of the general issue, or any other, which did not imply an admission of the contract, as charged in the declaration, would have created a necessity for the intervention of a jury to ascertain, as well the debt as damages.

But it is contended, that in *Boardman vs. Ewing*, this Court adopted a different rule. There, it will be observed, the case was essentially different. The question of locality did not arise on the pleadings:

there was no averment that "the city of New York" was in the State of Alabama. The question related alone to the sufficiency of an affidavit to take the depositions of a witness, who was therein stated to reside in the city of New York. The *depositions* could be legally taken only on a shewing of the non-residence of the witness. The affidavit, from the object in view, strongly implied the fact, but it was not expressed, otherwise than by naming the city in which he resided. Thus, on a mere matter of *evidence*, the question was presented, whether we would understand the place to be the *City of New York*, in the State of New York, or some city of the same name in Alabama. I consider the principle entirely different; and that there is nothing in the case last referred to, inconsistent with the current doctrine, by which we have been, and are yet governed, in reference to the *venue* in pleading.

We say, the judgment must be affirmed.

BURFORD *versus* CUNNINGHAM, *et al.*

Whether a defect, existing in the indorsement of a writ, is available on demurrer, where a party has cravedoyer, and filed that demurrer in time: or, whether there may not be a proper case for demurrer, after a judgment by default—*Quære*.

But, after a judgment by default, a party will not be permitted by *demurrer*, to evade that rule of practice, which prohibits all dilatory pleas without the consent of the adversary, after the time for filing those pleas has expired.

In this case, the plaintiff, Burford, instituted an action of debt, in the Circuit Court of Jefferson, to recover of the defendants the amount of a promissory note. The indorsement of the cause of action, on the writ, described it to be a sealed note, without set-

ting out the seals, and the declaration was in the common form upon a writing obligatory, but omitted a description of the seals. At the trial term, a judgment by default, for want of a plea, was rendered against the defendants, which was opened on affidavit of merits, and permission given to plead. The defendants demurred generally, to the declaration and writ; which demurrer, the Court sustained, and gave the plaintiff leave to amend. The plaintiff having declined to amend, took his writ of error to this Court, and assigned the action of the Court below as a ground for reversal.

PECK, for Plaintiff.—The objection here, not having been taken at the appearance nor trial terms—nor when judgment by default was entered, was sought to be available when the case was opened on an affidavit of merits.

The defect, if it was a material one, was clearly abateable only on plea, and at the appearance term. But the objection is immaterial.

According to the English practice, a defect in the writ could not be taken advantage of, on demurrer. The practice is the same here.—*Aik. Dig.* 278—1 *Minor's Rep.* 385, 392—1 *Stewart's Rep.* 17, 275—2 *Stewart*, 130—*Minor's Rep.* 102.

ELLIS, *contra*.—The rule is, that when a demurrer is filed, it reaches back to the first defective pleading. When oyer of the writ and indorsement was craved in this case, they became part of the record, and the variance apparent, was fatal.

It is of no consequence when the demurrer is filed, so that the defect complained of is a material one.

Here, we are notified of being sued on a *promissory note*, and at the trial a *bond* is produced against us.—*Lee vs. Adkins*, *Minor's Rep.* 157.

By Mr. Justice HITCHCOCK :

This was an action brought by the plaintiff in error against the defendants, in the Circuit court of Jefferson county. The writ is in the *debet and detinet*, for two hundred dollars. The endorsement on the back of the writ, describes a promissory note dated the 6th of February, 1830, due the 25th December, 1831, for two hundred dollars, stating it to be signed and sealed by the payors. There are no seals set out opposite to the signatures. The declaration is in the common form of an action of debt on a writing obligatory, describing such an instrument as is set forth in the endorsement of the writ, except the seals. A judgment by default was taken at the trial term of the Court, for want of a plea, and at the same term the defendants asked leave to open the default, filing affidavits setting forth an excuse for not having pleaded in time, and swearing to a defence on the merits; upon which the Court set aside the default, and gave the defendants leave to *plead*. The defendants then cravedoyer of the writ and endorsement, and demurred generally to the "*writ and declaration*," as not being sufficient "in law for the plaintiff to maintain his action against them, and that they were not bound by the law of the land to answer the same." No mention is made of the endorsement, in the demurrer, but the exception is to the *writ* and the declaration. The Court sustained the demurrer, and gave the plaintiff leave to amend, which he declined doing, but has brought the case here by writ of error.

The Circuit Courts are invested with authority to control the pleadings in cases before them, and may, in the exercise of a sound discretion, grant motions to set aside defaults, and allow pleas and demurrers to be filed. This should, however, be always exercised with a due regard to the rights and interests of the

opposite party, and never be permitted to be used for the purpose of delay, or to the hindrance of justice. That the shewing in this case presented proper grounds for setting aside the default, for the purpose of allowing a plea to the merits of the action, is apparent. The party swore that he had a defence to the merits, and that he had employed counsel at the appearance term, to file his plea, but that it had not been done, though he had supposed it had. The plaintiff had, however, by this default, acquired an advantage which should have protected him in his rights, at least so far as to have insured him a trial on the merits.

By the 10th Rule of Practice, a default duly entered, protects the plaintiff from any plea, while the party is in default. By the 11th Rule, a default may be set aside on *timely application*, and an affidavit of *merits*. And by the 12th Rule, no plea in abatement shall be received, *if objected to*, unless by the endorsement of the clerk, it appear to have been filed within the time allowed for pleading. It has been decided by this Court, "that an endorsement is not an essential constituent of a writ, and that no advantage can be taken of the want of it, after the return term."² Stewart, 130. Also, that in a case where the endorsement describes a note under seal, and the declaration describes a promissory note, with a scroll and judgment by default, this Court would not consider the variance sufficient to reverse a judgment, even if the Court would look to the endorsement for that purpose." Also, that the endorsement will not be looked into, to reverse a judgment, upon an alleged variance, between the endorsement and the declaration, except *upon plea in abatement*.¹ Stewart, 17. Ala. Rep. 92.

In the case of *Lee vs. Adkins*,² the Court refused to reverse, on special demurrer, because *oyer* was not

craved of the endorsement on the writ. This Court has, in various other instances, and invariably, discouraged defences of this kind, not going to the merits, and particularly when the defendant has been in default.

In this case, this defence could not have been made by plea in abatement, at the time this demurrer was filed. It would have been in express violation of the 12th Rule, before quoted. Had the Court the power to permit the party to evade the force of that rule, by filing a demurrer? and is a demurrer a proper mode of taking advantage of such a variance? This latter question has never been distinctly presented before. In the cases before cited, the question has been presented incidentally, and the cases have been disposed of on some other ground. While special demurrers were allowed by law, there could, perhaps, be no objection to them: but now, that no demurrer shall have any other effect than that of a general demurrer,* it is proper to enquire, whether a general demurrer reaches a case like this. A general demurrer, it will be admitted reaches only to matter of substance. It must appear on the face of the *preceding pleadings*, and so far as appears by reference to *Chitty's Pleadings*,[†] never goes behind the declaration.

*Aik. Dig. 277.

†1 Chitty, 700.

In this case, the allegation is, that the writ and declaration are not sufficient, in law, to sustain the action. If we look at those alone, without reference to the endorsement, the demurrer cannot be sustained, for there is no variance between them, and there is no defect upon the face of either. Without, however, deciding whether, when the party comes in time, and craves *oyer* of the endorsement on the writ, and demurs, his demurrer would not be sustained, or whether there might not be a proper case for a demurrer after judgment by default is opened---I am clearly of

the opinion that after a judgment by default, the Court has not the power to allow the party, by way of demurrer, to evade the penalty of the 12th Rule, which prohibits all dilatory pleas, without the consent of the party, after the time for filing those pleas has expired. It is sufficient that these technical defects, are allowed, when taken in time. It is, therefore, the opinion of the Court, that the judgment should be reversed, and the cause remanded, with leave to the defendant to plead to the merits of the action.

ROGERS & SONS *versus* SMILEY & GRIFFIN.

A plea, commencing with matter of abatement, and concluding in bar, is defective and bad, on demurrer.

As a general rule, a demurrer opens the whole pleadings in a cause, to the consideration of the Court, and will be extended to the first substantial defect existing therein; but this is always upon the supposition, that the pleadings have been properly filed—in due time, and perfect order.

And where a plea in abatement was filed after several continuances, and after a demurrer had been considered, and the general issue pleaded, the Court refused to extend a demurrer to the plea, back to a supposed defect in the declaration.

Assumpsit in the Circuit Court of Tuscaloosa. And the plaintiffs declared for money paid, &c. at the instance and request of the defendants, they being partners in trade. The writ, as appeared, was executed alone on Griffin, and thereupon, in accordance with the statute in such case made and provided, the declaration was filed against both defendants. And afterwards Griffin having appeared, cravedoyer of the writ, and filed a special demurrer, for variance between the indorsement thereof, and the declaration.

After continuance, leave to amend the declaration was asked and granted to plaintiffs; whereupon, they filed other counts, and Griffin pleaded *non assumpsit*, as to himself; which being stricken out on motion, he filed the general issue, and a special plea, averring, that defendant Smiley, was beyond the jurisdiction of the Court—that any copartnership before that time existing between them, was ended before the commencement of the said suit—that process in said suit had never been served on said Smiley, and concluded with an allegation, that he the said Griffin had not undertaken, assumed and promised jointly with said Smiley, as charged in the plaintiffs declaration, and thereof put himself upon the country, &c. The plaintiffs, as to the first plea, joined issue, and to the special plea, demurred.

After many continuances, the Court, on consideration of the demurrer, ruled, that the plaintiffs' declaration not being sufficient in law to maintain the action, the demurrer to the plea reached the same, and that judgment should be rendered for the defendants.

On a bill of exceptions, the plaintiffs brought the case to this Court.

This case was argued at length, by CRABB for the Plaintiffs, and by

PECK, STEWART and ELLIS for defendants.

On the points decided by the Court, it was contended for plaintiffs, that the demurrer was improperly permitted to extend to the declaration. The defendant, it was said, had before demurred to the declaration. Then was the time when he should have availed himself of any defects which it might contain.

The general rule is admitted, that a demurrer reaches back to the first substantial defect that has

been made in pleading; yet this rule must not be regarded as one without exceptions. For, where it appears, by the replication of the plaintiff, to a bad or defective plea, that the plaintiff has no cause of action, judgment must go against the plaintiff, although the defendant by his plea, committed the first defect in pleading. The plaintiff is estopped, by his own shewing, from requiring that the demurrer should extend further back.—*Gould's Pl.* 376, 474, 475. And so it is with the defendant. If the plea shews that the party has no defence, the defendant is estopped from carrying the demurrer back to the plaintiff's declaration.

The second plea is what is called a technical traverse; that is, where affirmative matter is set up implying a negative, and a negative following "therefore" is added. In such case, the inducement is the substance of the plea; and if it does not set out such facts as will authorise the Court to infer the negative, the plea is bad.

The inducement, here does not set out that the partnership was dissolved, but merely that Smiley was beyond the jurisdiction of the Court. It is a notice: and a service on one partner is notice to both. *Aik. Dig.* 268. The inducement here, does not justify the statement that the partnership is determined. Besides, this plea is not responsive to the declaration, which states that Smiley and Griffin were long previous indebted, &c. The plea was no defence; and therefore, the demurrer could not extend back to the declaration.

But, if this were an irregularity, it is not such a one as can be taken advantage of by demurrer. It can only be matter of abatement: and by plea in abatement only, could the objection properly be made. It is a rule of pleading, that a party cannot demur in

abatement. A party is only entitled to plead in abatement at the first term; but if he could take advantage of matters of abatement in this way, this salutary rule of law would be defeated.—(See *Gould's Pl.* 297, 3 *Stewart*, 192, 95.) Besides—this, if a defence at all, is a defence personal to Smiley. He does not complain. It was no defence to Griffin; for, he surely had due notice. Griffin had also pleaded over, and therefore, if for no other reason, he could not be allowed to take advantage of this alleged irregularity.

The declaration is good. It was said to be bad, because, as was alleged, it appeared by the declaration itself, that Smiley and Griffin were not partners at the commencement of the suit. If this were admitted, this is not matter of substance. The substance of the declaration is a past promise, made as copartners. As to the promise then made, the partnership still continues. This is the general principle. How else could partnerships ever be wound up? The doctrine is, that, once a copartner, always a copartner, as to the acts of the partnership during the time of its existence. Let it be admitted, that after dissolution, one partner has no right to bind the other, as to acknowledgments of old debts, or creation of new ones—this interferes not with the case. The co-partnership between partners is cut short by a dissolution: but it is not so between them and the rest of the world, as to what has been done during its continuance.—*Gow on Partnership*. 79, 80, 246, 253—1 *Taunt.* 104—17 *Vesey*, 298—4 *Binney* 275—*Kent's Com.* 28.

On the part of the defendants, it was said, that the second of these pleas was good. The plaintiff was suing under a statute, and the plea, avers, that at the time when the action was brought the defendants

were not partners, which if found true, went to defeat the action as to the service on the parties.

The Court below, in its decision, as was contended, rightfully sustained the demurrer to the plaintiffs' declaration. The general proposition is admitted that a demurrer reaches back to the first error in pleading; and as to the exception where there is a bad replication on a penal bond, the replication is there substantially a part of the declaration: it is that part in which the breaches are assigned. The plaintiff may there be said to have committed the first fault—the replication being but a supplementary part of the declaration. The same doctrine has been held in this Court, as to the demurrer reaching back, even where the declaration had been determined once to be good. See the case of *Cummins and Foster vs. Gray*.

The question then arises, is the declaration good? We say not. Where two have been partners, and the partnership has been dissolved, a service *only on one*, even if judgment went by default, would be error; and this is a much stronger case. The statute which authorises service on one, to be notice to all, speaks of existing firms. This statute is in derogation of the common law, and should, therefore, be construed strictly. If the Legislature had intended to extend the same rule to dissolved firms, they would have used different language. The reason of the rule does not apply to dissolved firms. Confidence is presumed among existing partners; but not among members of dissolved firms.

The process and pleadings in this case, sufficiently shew, that the firm of the defendants was dissolved. The writ speaks of them, as "merchants heretofore trading under the firm of Smiley & Griffin:" and the declaration, after describing the plaintiffs as merchants trading under the firm of Rogers & Sons, describes

the defendants as merchants "heretofore trading under the firm of Smiley & Griffin." This evidently means, in defiance of criticism, that these men had been, but were not then partners. A case has been decided in this Court, where judgment had gone by default, yet the judgment was reversed, on the ground that the statute only applies to present, and not to past firms. This is a stronger case, for Griffin made the necessary exception in the Court below. Wherever the plaintiff proceeds under the statute, by service on one for all, I hold, that there must be a substantive averment, that the firm is an existing firm, otherwise judgment against both would be error.—See *East's Rep.* 142.

By the English law, where some of the obligors are outlawed, service is good (in a joint action) against those who are not outlawed; yet the outlawry must be shewn in the declaration, or it is good cause of demurrer.—*Carey on Part.* 48. And under our laws, where suit is brought on a joint contract, not coming under the statute of 1818, the plaintiff can not take judgment against one alone, until he has at least proceeded to a *pluries capias* against the other.—*Minor's Rep.* 77. Where suit is thus brought against two, a discontinuance against one is a discontinuance against all.—2 *Stewart*, 494. A party may sue one of a firm; but if he elect to sue both, a discontinuance as to one is a discontinuance as to both. It is assigned for error, that the Court would not permit the party to discontinue as to Smiley: when, in fact, it would have been a discontinuance as to Griffin.

This is a good plea in bar. If the defect were in the writ alone, it could perhaps be only reached by a plea in abatement; but the error is carried into the declaration, and there is no such thing as a plea in abatement to the declaration alone. This plea says,

if there were any partnership, it was at an end at the time of the commencement of this suit. The demurrer admits the fact, and thus proves that the plaintiffs have no right to recover. This plea was drawn to suit the palate of the Court, but it is believed to be a good plea in substance, though not in form. If it be taken as a plea in abatement, it does not need to be verified by oath, because the truth of its averments appears from the record. For the same reason, no plea was necessary. A demurrer would have reached the defect.

Does it not appear from the declaration that this partnership was dissolved? If so, the demurrer reaching back, brings this matter before the Court for its judgment. The exception as to the effect of a demurrer going back to the first defect in pleading, will not apply to this case. The condition of plaintiffs and defendants are quite different. If the plaintiff shew by his replication that he has no cause of action, it is true, he must fail, however defective the plea may be; for where there is no cause of action, no defence is necessary; but it will not do to say, that where a defendant shews by his plea that he has no defence, the demurrer will not reach back to the declaration; for if the declaration prove to be bad, no defective pleading on the part of the defendant—no want of defence—can entitle the plaintiff to a recovery.

By Mr. Justice HITCHCOCK:

N. Rogers & Sons issued their writ in the Circuit Court of Tuscaloosa county, on the 11th November, 1823, commanding the sheriff to take "the bodies of William Smiley and Ira Griffin, merchants, heretofore trading under the firm of Smiley & Griffin, if to be found, &c. The defendants were sued in *assump-*

sit, for money paid by the plaintiffs as accommodation acceptors of sundry bills of exchange, drawn by the defendants on them, and which amounted to five thousand one hundred and twenty three dollars and seventy five cents ; and the endorsement on the writ sets out a list of the bills, and an acknowledgment, signed by Griffin & Smiley, that they were to provide for their payment, by shipments of cotton to N. Rogers & Sons, in season. The sheriff returned the writ, executed, but was permitted afterwards, in 1834, to amend his return ; which, as amended, is as follows : " Came to hand and executed, same day issued on Ira Griffin—Smiley not found."

At the March term, 1824, the plaintiffs filed their declaration, consisting of nine counts, setting out their claim in various ways. The commencement of the first count is as follows, to wit : " Nehemiah Rogers, *et al.* merchants, trading under the firm and style of N. Rogers & Sons, complain of Ira Griffin and William Smiley, merchants and copartners, heretofore trading under the firm and style of Smiley & Griffin, the said Griffin being in the custody of the sheriff, &c., and the said Smiley is declared against, owing to the writ's having been executed on his said copartner, Griffin, according to the statute in such cases made and provided, of a plea of trespass on the case," &c.

At the March term, 1824, the defendant, Griffin, appeared by his attorneys, craved *oyer* of the writ, and endorsement, and thereupon filed his separate *demurrer* to the endorsement and the declaration, setting out nine separate and special causes of demurrer, which allege sundry variations between the endorsement and the declaration, and also specifying sundry defects in the declaration.

At this stage, the case appears to have been continued

until March term 1827, when the plaintiffs asked for and obtained leave to amend their declaration, and the cause was again continued. At the October term following, it appearing to the Court that the further prosecution of the suit had been perpetually enjoined, it was, by the judgment of the Court, ordered to be *dismissed*, at the costs of the plaintiffs. To this judgment of dismissal, the plaintiffs took a writ of error to this Court, returnable to July term 1830. This judgment was, at the January term, 1832, of this Court, *reversed*, and the cause remanded: and at the April term, 1832, the cause was reinstated and placed upon the docket; at which term the plaintiffs filed three additional counts to their declaration, under the authority given at March term, 1827, to amend the declaration. The cause was again continued to October term, 1832, when the certificate of the clerk of the Supreme Court was filed, certifying that the injunction which had been allowed, prohibiting the further prosecution of the suit, had been dissolved, and the bill dismissed. Whereupon, the defendant Griffin, filed a *separate plea of non-assumpsit*, which was, on motion of the plaintiffs' attorney, ordered to be stricken out, and leave was given the defendant to plead *instante*; upon which, the defendant filed two pleas. 1st. A separate plea of *non-assumpsit*, similar to the one just stricken out. And 2d. A plea in the following words: "And for further plea in this behalf, the said Ira Griffin, defendant, saith *actio non*, &c. because he saith that at the time of the commencement of this suit, and since that time, William Smiley, with whom this defendant hath been impleaded, was beyond the jurisdiction of this Court, and ever since hath been, and yet is; and that before that time, if any co-partnership ever did exist, between the said William and this defendant, the same was

determined and at an end before the commencement of this suit, and that process never was served upon the said William ; and thereupon, the said Ira Griffin for himself separately, saith, that he the said Ira did not undertake, assume, nor promise, jointly with the said William, in manner and form, as the said plaintiffs in their said declaration have complained—and of this he puts himself upon the country.”

To the first of these pleas, the plaintiffs joined issue, and to the second they demurred. The cause was continued from term to term, in this state, until March term, 1834, when judgment by default was taken against Smiley ; and at that term, the Court decided, that the plaintiffs’ demurrer to the defendant’s second plea, reached back to the plaintiffs’ declaration, which was decided to be insufficient in law, to maintain the action, upon which, judgment final was rendered for the defendant.

There was a bill of exceptions taken to the opinion of the Court, upon sundry questions raised at this term, but as none of them are material to the case, as viewed by the Court, they will not be noticed.

Two questions present themselves for the consideration of the Court, upon this case. The first is, whether, under the circumstances here disclosed, the demurrer does reach back so as to authorise an enquiry into the sufficiency of the declaration ; and,

2d. If it does, whether the declaration is sufficient.

The first of these questions involves an enquiry as to the character of the second plea, and the circumstances under which it was filed.

The plea sets out with stating matter of inducement, which if good at all, is properly matter in abatement. It alleges, that “before, and at the time of the commencement of this suit, the defendant, Smi-

ley, was, and ever hath been since, beyond the jurisdiction of the Court, and that if ever any partnership existed, it was determined before the commencement of this suit, and that process was never served on Smiley." So far, the plea does not deny that there had been a co-partnership, as charged in the writ and declaration, and it does not assign any reason for its dissolution, except that inference is to be drawn from the alleged absence of Smiley. It does not aver any dissolution, in fact, but leaves the matter to inference entirely. So far, it is matter, as was observed before, which could only be urged in avoidance of this writ, on the ground of mis-joinder of parties, or defective service of the writ. The balance of the plea is, however, of an entirely different character: it is properly matter in bar of the action; and if any thing, amounts to the general issue. After stating the inducement as aforesaid, it concludes—"and therefore, the said Ira Griffin for himself separately, saith, that he the said Ira, did not undertake, assume, nor promise jointly with the said William, in manner and form as the said plaintiffs in their said declaration have complained—and of this he puts himself upon the country."

This plea must be taken entire—it cannot be divided. If we look at the inducement, it is in abatement, and should have prayed that the writ abate. If we take the latter part, it is in bar, and is a repetition of the first plea, which immediately preceded it. "If matter of mere abatement is pleaded in bar, or if matter which goes only in bar, is pleaded in abatement, the plea in either case is ill," for in either case all distinction between these different classes of pleas would be confounded, and in the former case judgment in chief must be given for the plaintiffs.—*Gould's Pl.* 292. If this plea is tried by this rule, it

appears to me, it must be found defective. It may be true that Smiley was out of the country, and that the partnership was dissolved when the writ was issued, and yet it may be true that the defendant, Griffin did assume and promise, as stated in the declaration. One part of the plea is not necessary to the other; and the whole taken together does not make out a defence to the plaintiffs' right of action.

But, it is contended, that admitting the plea to be bad, the demurrer opens the whole case, and requires the Court to seize upon the first error, and that when thus examined, it will be found that the writ must abate, on the ground that the partnership is not properly charged, either in the writ or declaration, and that service being perfected only upon Griffin, he is not bound to answer in this form.

To this it is answered, and we think properly, that the plea, if filed for the purpose of avoiding this writ, is to be held as a plea in abatement, and if so, could not have been received, under the rules of Court, at this stage of the suit; and a party may in such a case, either move to strike out the plea or demur to it; and he shall have the same benefit in either form. Here, the defendant had, at a former term, demurred to the declaration, and at the time this plea was filed, had pleaded the general issue. It is admitted, that as a general rule, a demurrer opens the whole case to the consideration of the Court. But this is always upon the supposition, that the pleadings were all properly filed, in due time, and in proper order. To receive a plea in abatement, after a demurrer and a plea of the general issue, would be reversing the order of pleading. Besides this, a demurrer is not good in matter of abatement; and if in this case, a demurrer by the defendant, could not have been filed to the writ, this, can only extend back to matter of substance in the

declaration. This has been once before decided upon, by the former demurrer of the defendant to the plaintiffs' endorsement and declaration, and can not reach beyond the decision then made, and which has been cured by the leave given to amend, and the amendment made thereon. I am, therefore, of the opinion, that under the circumstances of this case, the demurrer does not reach beyond the plea.

But, admitting that it does, the Court, on examining the point contended for by the defendant, are satisfied that the writ and declaration are good, and that the defendant can properly be held to answer.

The writ described the defendants "as *merchants* heretofore trading under the firm of Smiley & Griffin," and the declaration charges them as being "merchants and co-partners heretofore trading under the firm and style of Smiley & Griffin." Here, in both cases, a partnership is charged to be in existence at the date of the writ, and the word "heretofore" has reference to the act of trading. They are not charged as *late partners*, thereby admitting a dissolution. Now, a partnership is a contract by which two or more persons engage to trade together for their mutual benefit, and the act of trading is the result of that contract; and unless it can be shewn that persons cease to be partners the moment they close their sales, it would be difficult to shew, in this case, that the present defendants are not charged as partners. This writ, then, charging the defendants as partners, a service upon one, is service upon both, by virtue of our statute, which declares, that "when any writ shall be issued against all the partners of a firm, service of the same on any one shall be equivalent to service upon all."

*Aik. Dig. 268.

But, even if there were any doubt on this point, the Court is not prepared to say, that in this case,

*Aik. Dig. 268

Griffin, upon whom service was perfected, could take advantage of the error. He, at least, is present in Court, and can make his defence, and if any one can come into this Court to complain, it must be Smiley, who being absent, and having had no notice of the suit, may be injured. Griffin has no cause for complaint, and if he had denied the existence of the partnership, the plaintiffs, under the provisions of our act, could have dismissed the suit as to Smiley, and have proceeded against him alone. But on these last points no opinion is given, as none is required.

The cause must be reversed, and remanded.

THOMAS & HARRIS *versus* HEARN, *et al.*

It is an inflexible rule, that chancery will not relieve against a judgment, where a party has been heard at law, unless he were ignorant of facts pending the suit, or those facts were such as could not have been received, as a defence at law.

Where facts and circumstances, available as a defence at law, have been omitted to be relied on, or where those matters have been passed upon by a Court of competent authority, and no steps have been taken to correct an erroneous decision of such Court, in relation to them; chancery will not interfere.

Where two, of three joint owners of a mill, were compelled to pay a judgment at law, on account of the joint property, the Court of Chancery, (under the circumstances, to save litigation, its jurisdiction being concurrent,) entertained a bill, and compelled the third joint owner, to contribute his proportion of the said judgment.

This case was commenced by bill in chancery, filed by the complainants in the Circuit Court of Jefferson. The bill disclosed, that on the 7th day of June, 1821, the said complainants, together with one of the defendants, Sims, for themselves and others, entered into a written contract with Hearn and San-

ders, for the erection of a mill dam, whereby, in consideration of the sum of two thousand dollars, the said Hearn and Sanders, bound themselves to construct said dam according to a specified manner, and in such a way as that it would stand good for the space of two years. That in part consideration for the building of said mill dam, the said complainants and Sims, executed their note for three hundred and fifty dollars, to the said Hearn and Sanders, to be paid in six months after the completion of the dam. That at the same time it was verbally understood, between the parties, that the said note and written agreement should remain in the care and possession of Thomas, until the contract under the agreement should be completed. That afterwards, and before the said work was finished, one Jones, since deceased, and then a partner or joint owner in the said mill, took the agreement and note into his possession, for examination. That after the death of Jones, his representatives Sims and one Banks, instituted an action, and recovered judgment on the note, in the name of said Hearn and Sanders, for the use of Sims, and Jones' estate. The bill further stated, that on the trial, at law, to recover the amount of the note, the Court rejected the complainants' defence, that the mill dam was not completed under the contract of Hearn and Sanders, and referred the complainants to their cross action. It also charged, that Hearn and Sanders were insolvent; that a fraudulent combination existed between Sims and Hearn and Sanders; and prayed that the judgment should be enjoined, and their judgment off-set against that obtained by Sims and Banks against them. The record shewed, that after the filing of the bill in this case, the complainants had prosecuted their action on the written agreement against Hearn and Sanders, and had reco-

vered judgment for the breach thereof, for upwards of two thousand dollars. The answers of Hearn, and Sanders, generally denied the allegations of the bill; denied their insolvency, and averred themselves able to pay all the demands of the complainants against them.

Sims, by his answer, averred, that the note sued on, was the property of himself and Jones; that it was sued in the name of the payees, because it was not indorsed; and insisted on his belief that the note went fairly into the possession of Jones.

There being no testimony rebutting the answers of the defendants, on a final hearing, the Court dismissed the bill, with costs. To reverse this decree, the complainants took a writ of error to this Court.

PECK and BAYLOR, for Plaintiff in error, cited in argument, *Ala. Rep.* 106, 114—7 *Johns. Chan. Rep.* 240—1 *Johns. Chan. Rep.* 91—14 *Johns. Chan. Rep.* 91—5 *Cranch*, 322—6 *Cranch*, 9, 51—3 *Cranch*, 220.

WILSON, *contra*.—2 *Hen. & Mun.* 146.

By Mr. Justice HITCHCOCK :

The bill in this case, charges, that the note upon which the judgment was rendered, was, by agreement, to remain in the possession of Thomas until after the mill dam should be completed, according to contract, and was not till then to be delivered to Hearn and Sanders: that it did remain in the custody of Thomas for some time, but that before the completion of the work, it got by accident or inadvertence, into the possession of Jones, one of the partners in the mill company, who did not return it, but kept it in his possession until his death, and that it never was delivered to Hearn and Sanders, by the complainants

Thomas and Harris, or by either of them, by their consent. It further charges that the work never was completed according to contract; that Sims and Jones were both partners in the mill company; that Sims, and complainants, were joint agents of the company; and that the note was given for the benefit of the company; that Sims and Jones were fully apprised of the circumstances under which the note was made, and of the non-performance by Hearn and Sanders of their contract. It avers, that the complainants endeavored to defend themselves at law, on the ground of the failure of consideration, but were told by the Court, that they must sue on the bond for the performance of the contract. It charges Sims with using his exertions to procure a judgment in favor of the plaintiffs, although he was himself a co-defendant. It charges, that the complainants have heard, and believe, that at the time Jones got the note, Hearn and Sanders were indebted to him and Sims, who were partners in trade, and that, fearing they might loose their debt, they agreed to take the note, either absolutely or conditionally, as payment, although they well knew the terms and conditions on which it was made, and as they believe, with a view to recover the amount of the complainants, and to put the money in their own pockets. They charge a fraudulent and collusive combination between Jones and Sims and Hearn and Sanders, to defraud the complainants. They aver, that Hearn and Sanders are insolvent; that they are liable for damages on their contract, to a much larger amount than the judgment; and pray an injunction until the suit they are about to bring, at law, may be decided; and that one judgment may be set off against the other, and for general relief. The supplemental bill states, that they had obtained judgment against Hearn and Sanders, for two thou-

sand dollars on the bond, thereby establishing a breach of the contract for the erection of the mill dam.

The answer of Hearn and Sanders admits, that the dam was not erected in strict conformity with the contract, but that it was altered by the consent of Thomas, the acting agent of the company. They consider the work to have been strictly and substantially done, according to the agreement, as modified by the consent of Thomas. That if the work has not stood firm, they believe the principal reason to have arisen from the manner of erecting the mill-house, with which they had no agency, and from the modifications made, by consent of Thomas, in the erection of the mill dam. They say they are *strangers to any* agreement, that the bond or note should remain with Thomas, as stated in the bill; that they are ignorant of the manner in which Jones obtained it; that, however that fact may be, Jones did not shew it to them, until after the completion of the work; that, Jones being a partner in the company might have had access to the papers; that, whether Sims and Jones, or the representative of Jones, are interested in the recovery, they think is immaterial to the complainants; that, they being the plaintiffs of record, no *beneficial interest of Jones or Sims, they think, can be noticed*. They say they understood that the decision of the Court, in excluding the defence at the trial, at law, is not such as the bill represents; that the only point decided, as it is believed, was, that the *issue was* too narrow and restricted to admit of evidence to shew, the manner in which the dam was completed; that the only matter put in issue, was the time when it was completed. They say they consider themselves amply able to pay any sum which the complainants may shew to be due; and Hearn avers he is not insolvent; and they deny any

intention of coercing payment out of the complainants, individually, but from the property of the company, that being first liable, &c.

Sims, in his answer, admits the contract to build the mill; that he does not know whether it was well built or not; that having disposed of his interest in the company, he had no concern, except to see that the debts contracted while he was a partner, should be paid. He admits, that the note sued on belonged jointly to Jones and himself; that he has learned it was taken in payment for a debt due Jones and Sims, but when it was taken, or on what terms, he does not know; that, as there was no endorsement or other transfer made, as passed such an interest as would enable them to bring suit in their own names, the suit was brought in the name of the payees. He conceives it is not important to the complainants case, what his (Sims's) interest may be, in as much as it is of an equitable character, the benefit of which could only be obtained by the prosecution of the suit in the name of the payees—one, which presents no barrier to a recovery in the form, in which the suit is brought, and that, even if it were so, it is an advantage which should have been taken at the trial at law. That, from his knowledge of Jones's character, and from his never having heard from the complainants before the institution of the suit at law, any thing suggested as to the manner in which Jones obtained the note, he cannot but believe that he came fairly by it.

Banks, executor of Jones, denies all knowledge of the transaction, except from rumor—sets up no claim to the money, and demurs to the bill, as do all the defendants.

All the matters charged in this bill, which relate to the manner in which Jones obtained possession of the note or bond; the consideration, if any, upon which

it passed to Jones and Sims; the failure of Hearn and Sanders to comply with the contract to build the mill dam; and the refusal of Sims to unite in the defence of the suit, were within the full and perfect knowledge of the complainants before the rendition of the judgment at law, and however forcibly they might have presented themselves to the breast of a chancellor, on an application for a bill of discovery, to be used on the trial at law, (and the Court are constrained to say, they present very powerful considerations) yet it is an inflexible rule, that a Court of Chancery will not relieve against a judgment, after a party has been heard at law, even where the fraud goes to the whole judgment, unless the party were ignorant of the facts pending the suit, or they were such as could not have been received as a defence at law.*

*1 Johns. Ch.
Rep. 96—320.
6 ib. 87.

In this case, the ignorance of the party is not alleged; neither is it averred that the party could not have proved all the facts set forth in the bill, by testimony *aliunde*, at the trial at law.

The grounds set up for going into chancery, are the facts, that the Court refused to permit the party to give evidence of a partial failure of consideration. The rule of decision being, at the time of the trial, it is alleged, opposed to the admission of such evidence; and the fact of the alleged insolvency of Hearn and Sanders.

Whether that rule of decision be correct, or whether later decisions have relaxed or modified it, it is equally clear that the party cannot now come into chancery and urge it as a reason for relief against the judgment at law. The matter was passed upon by a Court of competent jurisdiction, and no point was reserved for revision before a higher tribunal. To allow it to be again brought before a Court of Chancery, would open a door to endless litigation, which

would destroy the distinction between the two courts, and the Common Law Courts would ultimately be swallowed up in Chancery.

As to the question, whether the alleged insolvency of Hearn and Sanders can be urged to enable the party to off-set the claim for damages, which has since been reduced to judgment, it may be remarked, that the judgment having established the right of recovery, in favor of Hearn and Sanders, and excluding, as it has been shewn we are bound to do, every thing relating to the manner of the transfer of the note to Jones, and admitting, as the bill does, the indebtedness of Hearn and Sanders to Jones and Sims, is there any thing in the case which will defeat their right to the benefit of the judgment, or in other words, will the alleged insolvency of Hearn and Saunders, at the time of the transfer, admitting it to be true, have that operation. It is admitted, that a man in failing circumstances, may prefer one creditor to another, and in the aspect in which this case appears, does it present any other principle? If it does not, what peculiar objection is there to prevent Jones from availing himself of it, in this case. His relation to the company could not preclude him from securing his own debt, and that of his partner, or from doing any thing which any other person who stood in the relation of creditor to Hearn and Sanders, might have done. It cannot be doubted, that Hearn and Sanders could have rightfully transferred the note to any *bona fide* creditor, not belonging to the mill company, and it will not be pretended, that in such hands, this set-off could be allowed—more especially when the set-off is a claim sounding in damages, and the suit not yet brought. But admitting, that since the judgment for damages has been recovered, the equities are equal; the claim of Jones and Sims, is prior in time to

that of the complainants, and upon every principle, must be preferred.

That Sims refused his aid in the defence at law, cannot avail the complainants in this stage of the proceedings, whatever it might have done, on a bill filed in reference to the manner in which Jones obtained possession of the note. The defence having been so conducted as to preclude that investigation, he was not bound to defeat the recovery at law.

The only point then, left open for consideration, is, whether the bill can be entertained, so far as to compel Sims to contribute one third of the judgment and costs of the suit at law, on the ground of his original liability, as one of the obligors to the note or bond. On this point the Court has had some difficulty, as it would seem, that this could be recovered at law. But, under the circumstances of the case, and as the jurisdiction of a Court of Chancery is concurrent with a Court of Law, in matters of contribution—as the money has been received by Sims, to save delay and multiplicity of actions, as each of the complainants might have to sue for his share of the amount paid by him, we think the bill should be retained for that purpose.

On this ground then, the decree below must be reversed, and a decree rendered here, in favor of the complainants, against the defendant Sims, for one third of the judgment, interest, and costs, of the suit at law in favor of Hearn and Sanders, computing the interest from the time of the rendition of the judgment in the Court below, together with the costs of the proceedings in Chancery, in this Court, and in the Court below.

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT OF ALABAMA.

JUNE TERM, 1835.

THE BANK OF THE STATE OF ALABAMA vs. HOOKS & DAVIS.

A *scire facias* against executors or administrators, to shew cause why execution, *de bonis propriis* should not issue, (after a judgment by default against the estate,) is not allowable on the bare return of *nulla bona*, to an execution *de bonis testatoris*.

In this case, the plaintiff in error obtained a judgment by default, in the Circuit Court of Tuscaloosa, against the defendants, as administrators of one Parham. A *fieri facias*, *de bonis testatoris*, being returned *nulla bona*, the plaintiff procured the issuance of a *scire facias* against the defendants, calling upon them to shew cause why execution *de bonis propriis*, for the amount of the judgment, should not issue.

The Court below, quashed the *scire facias*, and gave judgment for the defendants: to reverse which decision, a writ of error was taken to this Court.

STEWART, for Plaintiff—Contended, that *sci. fa.* was the proper remedy in this case.—6 *Johns. Rep.*

The *sci. fa.* was not issued in England on the return of *nulla bona*, without the empannelling of a jury to ascertain whether there had been a *devastavit*. Then, if the jury found the fact, there was record, and a *sci. fa.* might issue.

The *scire fieri enquiry*, was a writ issued after return of *nulla bona*, incorporating the *sci. fa.* with the *fi. fa.* directing an inquiry to ascertain the *devastavit*, and effecting by one writ what had formerly been effected by two. But debt, suggesting a *devastavit*, is the more usual remedy now in England.

The imputation of a *devastavit* is *quasi* the imputation of a crime, and will not be presumed without the finding of a jury—*Dunlap's Practice*, 1083, 1092—*Catlett vs. Carter's ex'ors*, 2 *Munf.* 24.

By Mr. Justice THORNTON:

Upon a judgment by default against the defendants in error, as administrators of William W. Parham, dec. in the Circuit Court of Tuscaloosa, and the return of *nulla bona de bonis testatoris*, to a *fieri facias* issued thereon, the plaintiff issued a *scire facias*, citing the defendants to shew cause why execution *de bonis propriis* should not issue, to levy the amount of the said judgment. On the motion of the defendants in error, who were the defendants below, the writ of *scire facias* was quashed, and judgment rendered for costs against the plaintiff, from which a writ of error is prosecuted, and the rendering of the said judgment is now here assigned for error.

No question concerning the revivor of judgments by *sci. fa.* is presented for our consideration on this record. If it were, I am induced to think, that the distinction, which, according to the general tenor of authority, existed at the Common Law, between real

and personal actions, has been as entirely obviated by our statutory enactments, as it has been in England. In every case where the necessity of reviving exists, the mode of *sci. fa.* is authorised to be pursued." *Aik. Dig. 270.

The only enquiry involved here, is, whether in the case of an existing judgment by default against administrators, a *scire facias* is a proper remedy to obtain satisfaction, out of their own goods and chattels, upon the return of *nulla bona*, to a *fi. fa. de bonis testatoris*. We have no statute upon this subject: nor can I discover that there is any, originating, or regulating the course of practice, as sometimes pursued in the English Courts, by *scire facias*, in lieu of the more usual one, by the action of debt on the judgment, suggesting a *devastavit*.

The proceeding in the case before us, is not in accordance with any practice, which at any time, has prevailed either in the Common Pleas, or Court of King's Bench in England. The history of this matter, as stated in *2d Crompton's Practice*, 108, which contains a methodical arrangement of the rules of practice in both those Courts, is this: "Formerly the method was, upon obtaining judgment by default against an executor or administrator, (which would reach only the goods of the testator or intestate) and *nulla bona* returned to a *fi. fa.* sued out on such judgment, to issue out a writ to enquire, whether the defendant had wasted any of the effects of the deceased; and if a *devastavit* was found by the inquisition, and returned thereto, then for the plaintiff to proceed by *scire facias*, for the defendant to shew cause, why the plaintiff should not have judgment *de bonis propriis*: to which *sci. fa.* the executor, or administrator, could appear, and plead *plene administravit*. But now, the *fieri facias* enquiry, and *scire fa-*

* See also, 1st
Saund. 219,—
note G.

cias, are incorporated, and made out in one writ, for expedition. However, this method, though much better than the old one, is seldom pursued at this day, &c. But the way is, to bring an action of debt on the judgment, suggesting a *devastavit*.”*

Now, in the case before us, there is no *enquiry*, nor is there any return of *a waste*, by the sheriff, on the *fi. fa.* So, that it is not even presented for our consideration, whether we would recognise and sustain, either the ancient or modern practice as above described, in lieu of the action of debt, suggesting a *devastavit*; for the case pursues neither course. So that, whatever we might decide upon a proper case, as to the binding force of this remedy, in either form of it, we cannot support the course here pursued by *sci. fa.* alone, without any thing but the return of *nulla bona*, as such was not allowed in the English Courts, by the authority of which, we are urged, as precedents of practice, to tolerate this procedure.

Let the judgment be affirmed.

CAWTHORN *versus* DEAS.

The master of a slave, is not liable for injuries, caused by the negligent conduct of such slave, while not acting in his master's employment, or under his authority.

This action was trespass on the case, brought by the defendant in error, in the Circuit Court of Henry. The plaintiff there, declared for an injury caused to his property, by the negligent conduct of the defendant's slaves. The Court below, during the trial,

charged the jury, that it was not essential for the plaintiff to prove, that the slaves acted under their master's authority, but that, in presumption of law, slaves were always under the owner's control, and that he was liable for their negligent conduct. The jury, under this charge, returned a verdict in favor of the plaintiff, and by bill of exceptions the defendant brought his case to this Court.

PECK, for Plaintiff in error.—The charge of the Judge is too narrow. A master is only liable for an injury resulting from the negligence of his slave, while in pursuit of the master's business, or acting under his orders.—*Reeves*, 357—3 *Mass.* 385. The charge makes no distinction between an injury resulting from the negligence of a slave, whether he be, or be not, engaged in the business of the master, or whether he is, or is not, acting under his master's orders. Suppose a slave leave his master's quarters at night, without his consent, to fish or hunt; and while absent, should carelessly, with a torch, set the woods on fire, and a neighbor's crop, fence, or buildings be by that means destroyed: would the master be liable? If this be the law, it throws upon every slave holder a most fearful responsibility. But, this Court said, in the case of *Brandon* and *The Huntsville Bank*, "to make the master responsible for the torts of the slave, the slave must, at the time, be in the immediate employment of the master, or from the vicious habits of the slave, and his general liberty, some degree of culpability must attach to his master"—1 *Stewart*, 340.

By Mr. Justice THORNTON:

This is a writ of error, brought by the plaintiff, to

a judgment rendered for the defendant, in the Circuit Court of Henry county, in an action of trespass on the case ; instituted to recover damages from the plaintiff for an injury done to the defendant, by the slaves of the plaintiff. A bill of exceptions taken during the progress of the cause, contains the following charge given by the Court to the jury. "It was only necessary in this action, for the plaintiff to prove, that the corn was the property of the plaintiff, and that it was destroyed by the negligence of the defendant's slaves ; and that it was not necessary to prove that the slaves acted under the express orders of the defendant ; that in presumption of law, slaves are always under the control of the master ; and that masters are in law liable in this form of action, for the negligent conduct of their slaves." The only question presented by the assignment of errors is the propriety of this charge. If the proposition, that the master is liable for injuries accruing from the negligent conduct of the slave, although not in his employment, or in the execution of his authority, be not expressly announced in this charge ; yet such might have been fairly deduced from it by the jury ; in which case, as much as if it had been explicitly declared ; if it be illegal, the assignment is well taken. The doctrine of the charge, thus interpreted, conforms to no code from whence we derive our notions of jurisprudence—neither to the Common Law of England, nor to the Civil Law. According to the former, the master is only liable for torts done in the execution of his authority, or for damages flowing from negligent conduct in his employment.¹ According to the latter, though the master be liable for any injury or damage done by the slave, yet that liability is limited to the value of the slave, it being always in

¹ 3 Bac. Ab. title mast. & servant, K. 560—2 Salk. 441.

the option of the master to pay the estimate of the damage done, or surrender the body of the slave as a recompense.* It must be conceded that the Common Law upon this particular head, is not framed with reference to any such relation as exists in this country between owner and slave ; and that (though by no means identical,) the resemblance, is much greater, between the condition of slavery with us, and amongst the Romans, than between it, and any condition recognised by the Common Law. It is apparent too, that by adopting the principles of the Common Law, as above cited, it will result from the peculiar nature of our slavery, that there is no redress, *civilliter*, for any injury done by a slave, not acting in obedience to his master's authority, express, or implied. Punishment may operate as a preventive, but so far as remuneration is concerned, it is, as if the injury was effected by the natural elements of air, or fire. By the Common Law we know, in case of injury to third persons, either the master, or servant, or both, were always responsible. But notwithstanding all this, and many other discrepancies not here adverted to ; upon the question of the liability of the master for the acts of the slave, I feel bound to adopt in this case, the principles of the Common Law, as applied to master and servant. The Court below having departed from them in the charge excepted to, the judgment must be reversed, and the cause remanded.

*Crompton's Jus.
354, '5.

2p 280
95 502LOWREY *versus* MURRELL

Payment, in discharge of a debt, in genuine Bank Notes, if made *bona fide*, and in ignorance of the failure of the Bank, is a valid payment; though at the time, the notes might be valueless.

In error from the Circuit Court of Pike. Lowry was indebted to Murrell in the sum of one hundred dollars. In part payment of this debt, the former paid to the latter, two notes of twenty dollars each, on one of the Banks in Georgia. Murrell afterwards brought his action against Lowry before a Justice of the Peace, for the amount of the notes, and recovered judgment, on the ground, that the notes were on a Bank that had stopped payment. Lowry took the case before the Circuit Court, where a trial was had on the issues of *non-assumpsit* and *payment*. Lowry requested the Court to instruct the jury, that if they believed from the evidence that the notes were genuine, and were paid in good faith, in part satisfaction of a debt—no proof having been made that the notes had been presented to the Bank, or that any offer had been made to return them, the plaintiff could not recover: also, that the plaintiff could not recover unless he shewed a failure of the Bank before the time that the suit was commenced before the magistrate. The Court refused to give these instructions, or either of them, but instructed the jury, that the only questions were, did the defendant owe the plaintiff a debt—did he pass the notes in question in payment of it?—if so, were these notes on a Bank which had stopped payment before they were passed? and that, in the latter event, they must find for the plaintiff. The instructions refused, and the instructions given, were assigned as erroneous by the plaintiff in error.

PECK, for Plaintiff.—The defendant in error consented to, and did receive these bills as cash—they are admitted to be genuine—they were paid by the plaintiff in error in good faith, in the ordinary course of business, without any knowledge that the Bank had ceased to redeem its bills; the defendant, therefore, must be deemed to have taken them in payment, and if so, it will be considered as payment—11 *Johns. Rep.* 409—15 *Johns. Rep.* 241—7 *Mass.* 286.

Bank notes stand upon a different footing from the notes of individuals turned over by a debtor in payment—they are treated and considered in the ordinary course and transaction of business, as money—they pass by will, as money or cash—1 *Burr.* 457—3 *Term Rep.* 454. A promissory note, payable in bank bills is a negotiable note, within the statute, which it would not be, unless bank bills were treated as money.—9 *Johns. Rep.* 120—19 *Johns. Rep.* 144—5 *Comen.* 186. *

Bank bills are considered a legal tender, unless specie is expressly demanded—solely upon the reason, that in conformity with common usage, they are regarded as cash—3 *Starkie's Ev.* 1390, note y.

Where a loss must fall on one or the other of two innocent parties, the defendant is to be preferred.—*Doug.* 655—1 *Bos. & Pul.* 260—1 *Mass.* 66.

There should have been an offer to return the notes, and the Judge ought so to have charged.—*Ala. Rep.* 299—1 *Stewart,* 354.

By Mr. Chief-Justice SAFFOLD :

Murrell brought his action before a Justice, to recover forty dollars of Lowry, and obtained judgment accordingly. Lowry appealed to the Circuit Court, where a trial was had on the issues of non-assumpsit and payment.

Supreme Court of New York distinguishes the effect of payments in genuine, from payments in spurious bank notes: they remark, that though the payee does not assume upon himself the risque of forgery, yet if the bill be genuine, and the bank fail, the parties being equally ignorant of the fact, the payment is available. In a late case, the same Court remarks, in reference to payment in promissory notes, that the question is the same, whether the note be given for a *precedent* or *cotemporary debt*, or whether it be the note of the party, or of a third person; that in each case it is, whether it was *agreed* to be received as *payment*.—(Porter vs. Talcott and Bowers.) Again, they say—the acceptance of the note of a third person, on the sale of a chattel for the consideration money, is

1 Cow. R. 359

3 Cow. 272,
11 Johns. Rep.
415, note.

payment.

The case before us is conceived to involve a principle essentially different. Bank notes usually pass as current money, implying no warranty of *solvency* on the part of the payer. From the nature of the subject, and the usage of commerce, a payment so made, is a full indication of final settlement; much stronger than the passing a promissory note, bond, or bill of exchange, which custom has not sanctioned the use of, as money. Good faith is equally demanded in either case; so that for fraud or misrepresentation respecting the quality of either kind of paper, as well as any other article, or for a false warranty respecting it, doubtless the person paying or passing it, would be legally responsible.

The idea may be plausible, that if a debtor has passed a currency in payment of his debt, which was believed at the time to have been equivalent to cash, but which in fact was worth nothing, or only half the nominal sum, the debt, in legal contempla-

tion, should remain unextinguished: Such is admitted to be the law and justice of the case, if the paper be spurious, because of the implied warranty of *genuineness* or *title*; but according to legal analogy, and the nature of commerce, it is impracticable to carry the principle farther. If an article of property be sold in good faith, without warranty, apparently of great value, when in fact it was of little or none, the vendee is without remedy; if in the same contract, and in the same good faith, *bank notes* be taken in payment, and the result should afterwards be found so far different, that the property prove sound, but the notes unavailable from the failure of the bank, the loss must, in like manner be borne by the vendor. The principle must be the same where the payment has been made of a pre-existing debt. Bank notes are usually in rapid circulation as cash, and are apt to pass through many innocent hands after the bank has stopped payment, and before notice thereof has reached the place; after which, nothing could be more embarrassing to commerce, than to upset all such transactions; nor would there be any justice in the principle: it would carry the responsibility back to the holder who first passed the note after the moment of failure, when several subsequent holders may have passed it in like manner, and without loss to themselves.

In the present case, the objection to the opinion of the circuit court, goes farther. The notes appear to have only depreciated about fifty per cent: there appears to have been no offer to return them—no diligence attempted to collect or receive the money of the Bank; yet the party thus making payment, was held responsible for the full value of the notes, when at least they appear to have been available to the amount of about

half their nominal value. But, independent of this latter objection, there is error in the record, for which, the judgment must be reversed, and the cause remanded.

 RANDOLPH *versus* COOK & ELLIS.

A suit cannot be legally commenced upon a promissory note, on the same day on which it becomes due.

That, suit is brought on a cause of action, before the same is past due, is available in error, even after appearance and judgment by *nisi dicit*.

Assumpsit on a promissory note. The defendants in error sued out a *capias ad respondendum*, from the County Court of Tuskaloosa, against Randolph, on the day the note became due. At the appearance term, the plaintiff in error entered a formal appearance by attorney, and at the succeeding term, judgment by default, for want of a plea, was rendered against him.

The plaintiff prosecuted his writ of error to this Court, and the question raised, was, whether the objection was available in error, after appearance and plea.

STEWART, for Plaintiff in error—said, that in this case suit was brought on the note before it was due. It was made payable “one day after date.” It was dated on the fifth day of the month, and on the sixth, suit was brought. The party was entitled to the whole of the sixth day to make payment.—3 *Star-~~kie's~~ Ex.* 1399—8 *Mass. Rep.* 453. It has been decided, that where a note was payable in sixty days,

the whole sixty days, the day of the date excluded, must expire before suit can be brought.—1 *Pickering*, 494—15 *Mass.* 193. The debtor has the whole of the day on which the note becomes due, to pay in: the law will not notice fractions of days. A day is a point, indivisible in law; and it must expire before suit can be brought.

ELLIS, *contra*—Said, he would waive the matter discussed by the counsel of the plaintiff in error, and put this case on a different footing. The writ was issued on the 6th of June. It was executed on the same day. At June term, the defendant appeared, but filed no plea. At the same time also, the plaintiffs filed his declaration. The note was then due. If the defendant intended to object to the premature issuance of the writ, then was the time; but he did not object, either by cravingoyer of the writ, and pleading in abatement, or in any other manner. How does the counsel get at the writ. It is mere process, to bring the party into Court; and no part of the record; neither has it been brought before the Court by cravingoyer.—See *Aik. Dig.* 278. At the succeeding term of the Court below, judgment by *nil dicit*, was given against the defendant, who is now plaintiff in error. Having appeared at the first term, and having altogether failed to plead, it was a waiver of the objection now brought forward.

It will be seen, by reference to the Almanac, that the June term of the Court commenced on the 11th of June. The note was then due. The objection here made could have been taken advantage of by plea in abatement, which defeats the action for the time, but does not bar it finally. And here there is no pretence that the action should be finally barred.

See *Nabors vs. Nabors*, page 162 of this volume: also, *Miner's Rep.* 92, 100, 102, 274, and 3d *Peters' Rep.* 459.

By Mr. Chief Justice SAFFOLD:

The action was assumpsit, brought by the defendants in error, on a promissory note drawn in their favor by Randolph. The note bears date on the 5th June, 1832; is payable one day after date, and the writ was issued and served on the 6th of the same month. The declaration contains one count only, which is on the note in the usual form, and is captioned as of June Term of the County Court, 1832, this being the return term. At the same term, T. J. Abbott, Esq. an attorney of this Court, entered a formal appearance for the defendant, on the Appearance book, in the manner prescribed by the rule of Court for entering appearances of record; but no plea appears to have been filed. At the succeeding December term, the record states, that the parties came, by their attorneys; and for want of a plea, judgment was rendered by default; to reverse which the defendant below, prosecutes this writ of error.

He assigns, as ground of error, that no cause of action is shewn in the plaintiff's declaration, in as much as the note declared on was not past due when the action was brought.

The plaintiff in error insists that he had the whole of the 6th of June to pay the note, and that no action could legally be brought till the 7th, fractions of days not being recognised by the law. This position is not contested by the counsel for the defendant in error; therefore, it is unnecessary to examine it. But admitting the principle, that the suit was prematurely brought, it is insisted that advantage could

only have been taken of it, on, or previous to the trial below, and that the objection has been waived.— This is the only question necessary to be considered.

A rule, which appears to be well sustained by numerous authorities, and salutary in principle, is, that matter merely abateable, where the defendant has had legal notice of the process, must be taken advantage of by plea; else the objection is considered to have been waived. This, I understand to be the rule which has uniformly prevailed in this Court, and that it holds equally, whether the abateable matter be *apparent on the writ*, or arise from *extrinsic* circumstances. If there be a *misnomer* of plaintiff or defendant, the process having been duly served on the true defendant, and a good declaration filed, for a cause of action corresponding with that indicated by the writ, the exception can only be taken by plea, within the time allowed for pleading. An objection to the service of the writ, whether it relate to the officer making it, or the time or manner of execution, has uniformly been considered to be waived by the regular appearance of the defendant, and suffering a judgment by *nil dicit*, or by pleading to the merits of the action. Even a judgment by default, where there has been due service of the writ, and there is no error apparent on the record, is an admission of the cause of action as alleged in the declaration. The premature commencement of this suit, is the only objection to it. After having been regularly served with the writ, the defendant, by his attorney, entered his formal appearance at the return term, and at the trial term, suffered judgment by default. I have no hesitation in saying, that in cases where the record does not disclose the fact that the suit has been prematurely commenced, the exception is allowable on

motion to exclude the evidence: in such cases this would be the only means of defence.

But in a case like the present, is the objection available in error, when not earlier claimed. I will notice some authorities applicable to the principle. In ¹ Wils. R. 141 *Wood vs. Newton*,* the action was *indebitatus assumpsit*, for the use and occupation of land. The defendant pleaded a tender on a particular day. The plaintiff replied, that the day of the tender was after the suing out of his *latitat*. The defendant rejoined, that the *latitat* was sued out before the cause of action accrued, as, anterior to its date, he had never assumed to pay, &c. To this the plaintiff filed a general demurrer. The Court sustained the rejoinder, holding that the issuance of the *latitat* was the commencement of the suit; and that as the demurrer admitted this to have been anterior to the cause of action, no recovery could be had thereon. This principle is quite clear: for there, though the declaration did not shew the objection, it fully appeared from the replication, rejoinder, and demurrer, the regular pleadings in the cause, that no right of action existed at the institution of the suit; and as the objection did not appear in the declaration, or the *latitat*, there was no waiver of it by pleading to the merits.

¹ Caine's, 69. In *Lovry vs. Lawrence*,* the suit was on a bill of exchange, presented for acceptance on the 1st October, 1801, and refused, of which notice was given to the defendant, who, on the 11th October, promised payment. The declaration was captioned of *July Term*, 1801, and shewed on its face, that the cause of action did not arise until the *October* following. On special demurrer for this cause, the Court held the action not sustainable, because it appeared from the declaration, that when it was filed, which, by law,

must have been subsequent to the institution of the suit, he had no cause of action.

In *Cheatham versus Lewis*,³ the fact, that the suit, ^{3 John. R. 42.} which was for a *libel*, had been prematurely commenced, also fully appeared on the face of the declaration: for this, there was a general demurrer, which was sustained. In both these latter cases, it was held that the suing out the writ was the commencement of the action; that the writ must precede the declaration, and if it appear that the cause of action had not accrued when the suit was commenced, the objection is available on demurrer. In the latter case, it is said to be equally so, in *arrest* of judgment, or *in error*. The Courts also use the general expression, that if the objection appear of *record*, it is available by either mode of exception.

The only difficulty I have felt in this case has been to determine, whether the appearance of the defendant, and the judgment by default did not cure, or constitute a waiver of the objection. In reference to this principle, respectable authority has maintained, that a judgment by *default* cures only such defects in the declaration as would have been aided by a *general demurrer*^b—that the effect of a demurrer to the pleadings is, that it reaches back through the whole record, and attaches ultimately upon the first substantial defect in the *pleadings*, on which ever side it may have occurred.^c It is also said that the objection, “that the right of action had not accrued at the commencement of the suit, *may* be pleaded in *abatement*; as where an action on a contract is commenced before the time appointed for the performance;” but that this plea is seldom necessary; because, if the defect appear upon the face of the declaration, it is fatal on demurrer; and if not it may generally be ta-

^b Gould's Pl. ch. 10, § 26.

^c Id. c. 9, sec. 36.

*Gould's Pl. c.
5, s. 137, '8.

ken advantage of on the trial.* The remarks of Judge *Gould* do not fully embrace the particular point under consideration; where, the defect does not appear in the declaration without reference to the *capias ad respondendum*, but appears from the latter; and where there is no plea to the merits, nor any exception taken in the Court below. It is clear, however, that the issuance of the *capias*, with us, is the commencement of the suit. From the other authorities to which I have referred, it appears, that if the defect appear from the pleadings, and has not been waived by the defendant's plea, it is available in error; nor do those cases limit the inspection of the revising tribunal to the *pleadings* in their technical acceptation, but seem to consider the objection fatal, if it appear in any part of the *record*, and to regard the process by which the suit is commenced as matter of record, for ascertaining the time.

*Doug. 61.

Several other early English cases are to the same effect. In *Ward vs. Honeywood*,^b it appeared from the *plaint* that suit was commenced before the maturity of the note, which was the cause of action. The Court of *King's Bench*, held, that the *plaint* was to be considered as the original and commencement of the action, and the defect thus appearing of *record*, the exception was available in error. There are various other decisions to the same effect.* Hence I conclude, that the judgment must be reversed.

*1 Comyn's D.
214, E—2 id.
E, 3.

By Mr. Justice THORNTON:

This was an action brought upon a promissory note, which, by the declaration appears to have been made payable to the plaintiffs, one day after its date; and the writ bears date on the day after the date of the said note—before, as is conceded, the same was past

due. At the return term of this writ, the defendant, by his attorney, entered his appearance; but failing to plead, at the trial term, a judgment by default final, or, more properly, of *nil dicit*, was taken against him. The case is brought up by writ of error, and the assignment presents the question, whether the fact of the writ being issued before the cause of action had accrued, is, under the circumstances, available in error. It is an axiom of the Common Law, that no action can be commenced against a party, before any cause for such action exists. That the action commences with the *capias* writ, in this country, is equally incontrovertible; as also, that this *capias* is a part of the record of the suit. Hence the validity of a tender, when pleaded, is tested by the fact of its being made anterior, or not to the impetration of the writ, the test of which by our statute, is not of the preceding term, but the true date of its actual signature by the clerk. So the statute of limitations, and sets-off, when plead in bar, are available or not, according as it may appear from the test of the writ, that the time had elapsed, or the set-off had been acquired, subsequent, or prior to that period of time. The ground assumed here, however, in support of the judgment below, is, as I apprehend it, that the commencement of the action before its cause had accrued, is such a defect as can be reached only by plea in abatement, and that, after appearance, if not objected to within the time prescribed for the taking advantage of abatable matter, the benefit of the defect is lost.

It is apparent to my mind, that this is not one of those irregularities, which an appearance of the party merely, will cure. So far as the writ merely operates as a summons to appear at its return, the appearance being entered, its object is accomplished; and if to

* 1 Chit. Plea.
last Am. ed'n,
437, 483.
Gould's Plead-
270, 289, 27.

bring the party into Court, were all that it is the office of a writ to do, then after appearance, it would be wholly immaterial whether there were any writ at all, or not; or what defects there might be in it. But this is not the sole office of our original writ of *capias*, and hence we see that a distinction obtains, as to defences proper to the form of the writ, and to the action of the writ; the former of which must be taken advantage of within a limited period, by plea, or are considered as waived; while the latter, though available in that mode, are now rarely so reached, because they are good on demurrer, or on motion, as in case of a non-suit at the trial, &c.* Some perplexity has been introduced into this head of our law, by adverting to the English authorities, without bearing in mind, that as a general rule, the filing of the declaration in that country is the commencement of the action, and not the issuing of the writ. When, however, even there, the writ precedes the declaration, and is the foundation and commencement of the suit, it is held fatal in error, even after verdict, to issue it before the cause of action existed. For the English doctrine on this head, see *Doug.* 61, 62; 1 *Wils.* 147; *Bac. Pl. B.* 51; 1 *Strange*, 21, &c.

In *Dunlap's Practice*, vol 1, page 120, which is an American work, the doctrine as declared from American decisions, is thus laid down: "The issuing of the *capias* is the commencement of the action, and the plaintiff, in order to maintain his suit, must have a cause of action at the time of issuing it: and if it appear on the face of the proceedings, to have been prematurely brought, it will be fatal on demurrer, or in arrest of judgment, or on writ of error." I feel assured that this is the doctrine of the Common Law, and it must be remembered, that our statute of *Jeo-*

fail and amendments, do not reach substantial defects of this character. The broadest of them, only protects, after verdict or judgment, against all defects on the face of the pleadings, not previously objected to; provided the declaration contains a substantial cause of action, and a material issue has been tried thereon. This statute cannot affect the case; for, in the first place, this defect is not in the pleadings, but in the writ, which is no part of them; and besides, there has been no issue tried, but only a judgment by *nil dicit*. Aik. Dig. 266.

It was urged in argument, by the counsel of the defendants in error, that as the party entered his appearance regularly, at the return term of the *capias*, and did not, afterwards, either by plea, or otherwise, object to the defect, he must now be held either to have voluntarily waived it; or if not, that his failure to use diligence in reaching it, must be visited by a denial of ulterior redress. The application of either of those principles to this case, would, as it seems to me, be entirely arbitrary; and if adopted, ought not only to extend to a case of failure to plead, or otherwise to raise the objection after appearance entered, but even to a case, where, after service of the process, no appearance is made; for the default is more inveterate in the latter instance, than in the former. So, they should be applied where, after service, with, or without an appearance, the record exhibits a case of a writ in debt, and a declaration in trespass; for here, too, the party might have appeared, or, after appearance, might have defeated the action in the Court below. I conclude, that however much force I might be inclined to allow to a plea to the merits, as constituting a waiver of this defect, I am clearly of opinion, that an

appearance alone, without more, should not deprive the party of his relief by writ of error.

Let the judgment be reversed.

DYER *versus* THE TUSKALOOSA BRIDGE COMPANY.

The Legislature has the same right to authorise the erection of toll bridges, by act incorporating a company for that purpose, which it has vested in the County Courts.

The keeper of a ferry, opposite a town, under license from the County Court, keeps it subject to the public convenience; and the erection of a toll bridge near such ferry, by a Company, under charter from the Legislature, is not a violation of the vested rights of such ferry owner.

The principle, that private property can not be subjected to public use, without adequate compensation, does not apply to alleged losses, sustained by the owner of a ferry, (over a public water course, opposite a town, and who holds the same under grant from the County Court) by reason of the erection near it of a toll bridge, under a charter, granted by the Legislature.

The Legislature, in an act incorporating a Bridge Company, having provided a mode for assessing the damages which might be sustained by the owner of any land, selected as a site and as a road to and from said bridge—such mode is conclusive, and the proprietor of land, so appropriated, must resort to the means pointed out by the statute, for compensation.

This cause was brought into the Supreme Court, by writ of error from the Circuit Court of Tuscaloosa, on the final decree of a chancellor, dissolving an injunction. The complainant filed his bill, praying an injunction against the erection of a toll bridge. He claimed, to be the proprietor of a ferry over the Black Warrior river, opposite the town of Tuscaloosa; which he held under a license from the County Court. The bill charged, that the defendants, by virtue of a charter granted by the Legislature, were proceeding to erect a toll bridge over the same stream, and within a short distance of the complainant's fer-

ry—that said bridge, if built, would prove of great injury to him, and eventually destroy his ferry—that he was the owner of lands on one side of the river, where the defendants were about to locate one of the abutments of the bridge, and a road leading therefrom. He insisted, that the passage of the charter, by the Legislature, was a violation of his vested rights, and prayed an injunction to restrain the company from proceeding.

PECK, for Plaintiff, said—A ferry is a franchise, and lies only in grant; and as such, it is a contract, within the meaning of the constitution.—See 6 *Cranch*, case of *Fletcher and Peck*. The parties to this contract are, the State and Dyer. The consideration on the part of the State, is comprised in the privileges granted, with all such as are incident thereto; and on the part of Dyer, the undertaking to keep up the ferry, and in a proper state of repair, for public convenience. The State could have no right to make a grant to another, afterwards, inconsistent with the grant of the ferry; and that the bridge privilege does destroy the ferry, there can be no doubt.

Was the grant of the ferry made on condition? And if so, was the subsequent grant within the condition? In regard to the condition, see *Aikin's Digest*, 363. Where there is a town, other ferries may be granted subsequent to the first grant; but that does not amount to a permission to grant the privilege of a bridge in the immediate vicinity, and thus destroy the first grant. Suppose this Bridge Company to be the first grantee: could the Legislature, in good faith, after the organization of the company, and after they had expended their thirty thousand dollars, grant a free bridge, so as to take away all the profits from them?

This act, granting the privilege of erecting a bridge, to a company, after the grant of the ferry to Dyer, is void, under the 10th section of the Constitution, which forbids a State from passing any law, impairing the obligation of contracts. Any act by which the contract is made worse, or of less value, is in violation of this part of the constitution. The State then, it is clear, is bound to protect the complainant in the privileges granted to him, and to do no act that will lessen the value of those privileges. The right of the Bridge Company to their grant, being incompatible with the grant to Dyer, cannot therefore be sustained. 3 *Story's Com.* 243, 350.

This act is also in violation of another provision in the Constitution, namely, that private property shall not be taken for public uses, without making compensation therefor. The northern abutment of this bridge is on the complainant's land; and yet there is no provision in this act for making compensation for this injury to private property. The act, in this respect, is against the very letter of the Constitution.

If the Bridge Company may thus infringe on the rights of the complainant, he is left without remedy. This bridge is private property. The Legislature have no right to condemn the property of one citizen, for the benefit of another: and if this property should be considered as *quasi* public, there is still no provision in the act for making compensation.

This bridge cannot stand on air. It must, if built, be placed on some body's land. Can this be legally done until the land is condemned? And here there is no provision for that purpose. The road to and from the bridge is to be a public road. For that, there is a provision. As to the road, the fee remains in the owner still. The title of the land is not condemned—only

the use. The road may be discontinued, but the bridge being private property, is vested in the company—and if the complainant's property may be thus taken away, it is taken away forever. The only interest the public has in this bridge is the right of passing over it. How is that privilege secured? It is not secured at all. The company may keep it open to-day, and close it to-morrow. They are not bound as in case of a ferry. They may nail it up at both ends: still the appropriation of the land is final.

This being a private act, it must be construed strictly, where it comes in conflict with the rights of a citizen. The company can take nothing by intentment. As to taking private property, they cannot do it without condemning it, and they cannot condemn it if the Legislature has not given them the power.—2 *Kent*, 284, '5, '6. Where the Legislature attempt to take private property for public use, the condemning power giving compensation, must be embraced in the act. The provision must be made at the same time that jurisdiction is assumed. If the Legislature take private property, not for public use, but take from A and give to B, they do what they have no authority to do.

This is not a public use. Those who pass, pay for it. The interest is in a private company.—2 *Bay's Rep.* 58.

CRABB, *contra*.—If the complainant has suffered any injury, his remedy is at law; and a Court of Chancery has no right to take jurisdiction of the case. *Aikin's Dig.* 364; and to shew that an ample remedy is furnished at law, see *Aikin's Dig.* 357. Independent of this, if an injury has been done—if a nuisance has been set up, the party has his action on

the case. Chancery will not take jurisdiction of wrongs in the nature of trespass.

But, I contend that no injury has been done. I admit that the power of regulating highways, and the like, belongs to the sovereignty : here, to the Legislature, as to the Crown in England ; but with this difference, that the Legislature hold their power under restriction ; they cannot confer a franchise, raising a private property, inconsistent with the public convenience. If they grant a privilege to an individual, it must be with the restriction as to public convenience. But I contend that the grant of a ferry is a mere license, not a franchise or contract. The Legislature could not carve out to Dyer or any one else, a larger power than they possessed themselves ; and they possess no power but that to promote the convenience of the public. If a license to keep a ferry, be a contract at all, it depends on the public convenience continuing to require it.

The counsel spoke of the restrictions resting on the State as to the establishing of other ferries within a certain distance of a ferry already granted.—There is no such restriction. The restrictions in the act, are on the County Court—not on the State or the Legislature. The restrictions do not apply in a town—nor to the establishment of a bridge after a ferry : these do not conflict. But these restrictions are imposed on the County Court, because the Legislature did not choose to part with their entire power. The State may still establish ferries nearer together—the public convenience being the guide. The restrictions on the County Court were not imposed for the benefit of the person to whom the grant was to be made, but for the benefit of the public. But, as to this grant to the Bridge Company, the Legislature

have granted the power themselves. See the case of *Hall vs. Ragsdale*, in this Court, June term, 1833.

With what view and understanding did Dyer accept the grant of this ferry? Certainly with a view to the existing state of the country, and with the knowledge that the Legislature, when the state of the country should require it, had power to erect bridges or establish other ferries.

There is no injury here, inconsistent with the true understanding of the original grant. If there is injury, it is incidental—the Court cannot know there is any injury; there may be custom enough for both. The provision of the Constitution, as to impairing the obligation of contracts, has never been understood to extend to political rights or powers, but to contracts effecting property.—1 *Kent*, 390. If the Legislature could grant away its political power, in the manner contended for, they might establish an aristocracy. The Legislature cannot control public concerns, or restrain public convenience by means of contracts. Look at the effect! Are we to be confined to the bad roads of the country, to save harmless some old grant? Are rail roads, bridges, and other internal improvements, to be thus restrained? It is impossible that the Legislature should have power thus by contract to restrain the improvements of society, for whose benefit the legislative body is constituted?

If the abutments of the bridge be on the land of Dyer, he can have his remuneration by writ of *ad quod damnum*. It cannot be necessary, that the act granting this charter, should provide for the *ad quod damnum*; the general law provides for it.—1 *Nott & McCord*, 387.

By Mr. Justice HITCHCOCK:

The complainant in this case, charges, that he, for

a long time has been, and now is, the proprietor of a ferry across the Black Warrior river, opposite the town of Tuskaloosa, under a license from the County Court of Tuskaloosa County ; that the defendants under, and by virtue of an act of incorporation granted by the Legislature of this State, are about to erect a toll bridge across the said river within a few yards of his ferry, which if completed will very materially injure, if not entirely destroy the value of his ferry. He further states, that he is the proprietor of a piece of land on the north side of the river, upon which the defendants intend to place one of the abutments of the bridge, and through which they intend to run a road leading from the bridge, out to the main public road, leading from his ferry to the country. He contends that this act of the Legislature is in violation of his private rights, and prays an injunction against the defendants, prohibiting the erection of the bridge.

The defendants have answered the bill, and have admitted the material facts as therein stated, but insist, by way of demurrer to the bill, that the complainant has not made out a case for the interposition of a Court of Chancery. The injunction, which was granted upon the filing of the bill, was, on hearing of the bill, answer and demurrer, dissolved, and the bill dismissed ; and the case has been brought to this Court for revision.

The complainant insists, that the grant to him of this ferry, is a contract between him and the State, and that this act of incorporation is unconstitutional and void.

I. Because it operates to the destruction of his grant.

II. Because it impairs the obligation of his contract with the State ; and,

III. Because it deprives him of his property, without due process of law, and without just compensation.

An investigation into the constitutionality of an act of a co-ordinate department of the government, is always a delicate, if not a painful duty. But, when the rights of individuals are concerned, and the question is distinctly presented, Courts have no alternative. Upon the faithful discharge of their duty, depends the "integrity and duration of the government:" and if the Court, in the investigation of this case, had found the positions assumed by the complainant, sustained by the constitution and the laws, they would not hesitate to pronounce the act complained of, void.

The Court has not, however, in the view which it takes of the complainant's rights, in this case, found any thing in the law complained of, which authorizes its interference.

The laying off, regulating, and keeping in repair, roads, high-ways, bridges and ferries, for the public use and convenience of the citizens, is an exercise of the supreme authority of the State, coeval with the institution of civil society, and indispensable to the free exercise of social and commercial intercourse, and as soon as men cease to roam abroad as savages, and lands become appropriated to private use, the reservation for public accommodation of a sufficiency for these purposes, is necessarily implied, and the mode of regulating its use, is necessarily vested in the State. It is a part of the *eminent domain*, and as such is treated by all writers on Public Law.* It is upon this principle that roads are laid out, and that the citizens are compelled to contribute either in money or labor to keep them in repair.

* Vattel, lib. 1, ch. 20, § 249, Bynkershoek, lib. 2, chap. 15. Domat, book 1 tit. 8, § 1.

24th Dec. 1878.
 18th Dec. 1880.

Our Legislature, in the exercise of this authority, have delegated to the Judge of the County Court and Commissioners of roads in each county in this State, the power to lay out public roads, to discontinue and alter the same, when found useless, so as to make them more useful—to establish ferries, by granting licenses to individuals under certain regulations; and to erect free bridges, under the direction of the overseers, or to grant licenses for toll bridges to individuals, under certain regulations. But in all cases where ferries and toll bridges are authorised, the rights of the individuals to whom the grants are made, are held subject to the superior and paramount rights of the community. The only right secured by law to persons who have licenses to keep ferries, is that “no ferry shall be established within two miles of another already established,” and in case of toll bridges within three miles, and this right does not extend to ferries opposite to towns. In such cases, as many ferries may be established as the Court may think proper; and in all cases bridges may be established along side of ferries, in the discretion of the Court; so that in this case, the right of the complainant was and is subject to the establishment of ferries, and the erection of a bridge even by the County Court, in the immediate neighborhood of his ferry. If the County Court could then, have authorised the erection of this bridge under the general road laws, it is not perceived that the Legislature, who have invested the County Court with this discretion, are prohibited from making the grant directly.

It is true, that the grant of a ferry is a franchise. There are a great variety of franchises;—some of them founded on valuable considerations, and necessarily exclusive in their nature, and which the gov-

ernment cannot resume at their pleasure, or do any other act to impair the grant, without a breach of the contract. An estate in such a franchise necessarily implies that the government will not either directly or indirectly interfere with it, so as to destroy or materially impair its value, either by the creation of a rival franchise or otherwise.* But a grant of a ferry over a public water course, and for the convenience of the community, is not such an exclusive grant as is contemplated in such a case. *Kent's Com. 458, 459.

But, it is contended, on the part of the complainant, that, admitting the Legislature have the power, upon the principles of public policy, to authorise the establishment of this bridge, and thereby destroy the value of this ferry, that this can only be done by making adequate compensation to him for this loss; on the principle that private property cannot be taken for public uses, without just compensation. If this was a private and exclusive grant, founded upon a valuable consideration paid therefor, this argument would undoubtedly be good. But, if we have successfully shewn, that this is not such a grant, as we think we have, then this principle does not apply. What property has the complainant in this ferry, except in its use? and by what tenure does he claim the right to this use? It was originally granted to him for the benefit of the public: that public, it is now thought, require greater facilities—they have been granted; and if his profits are thereby lessened, has he any cause of complaint? He received his license subject to this contingency, and must abide by the consequences. Suppose the public convenience should require the road leading to a ferry to be changed, and the old road closed up. The County Court

has the power given to them to do this. Can the owner of a ferry at the old crossing, say, that this must be done only upon paying him what he may lose by the change. The fallacy of the proposition appears too plain to admit of elaborate illustration.

But, it is contended, that the Legislature have not only wrongfully destroyed the value of the ferry, but that they also wrongfully authorised the taking of plaintiff's land for the abutments and the road.

By the 9th section of the act incorporating this company, it is made the duty of the superintendents named in the act, to "select a site for the bridge, and also a site for a road leading to and from said bridge, and mark out the same, and apply to the court of roads and revenue for a jury to assess the damages, if any shall be claimed, for the lands the road may pass through, whose duty it shall be to appoint said jury, and as soon as the damages shall be paid by the company, to order the road to be opened, under the same rules and restrictions as other public highways, and which road shall be of the first grade, until it shall intersect other roads."

Admitting, that as well by the Common Law, as by the 13th article of our Bill of Rights, private property cannot be taken for public uses, without just compensation, yet the Court can see nothing in the section above recited which conflicts with this principle. Here, as much ground as is necessary, for a road from the bridge to the main public road, is condemned, and placed upon the footing of other public highways; but before it can be taken, a jury is to assess damages, if demanded, which damages must be first paid before the ground can be used. This is the ordinary mode of condemning the use of lands in such cases. A transfer of the fee of the land to the

company was not necessary, and it is presumed, was not contemplated; and should the bridge be destroyed, and the company dissolved, the use of the ground would thereby revert to the original proprietor. It is decided in 2 *Bay's So. Car. Rep.* 38—that the Legislature of the country is vested with the power to pass laws for laying off roads and highways in every part of the State, and to appoint commissioners to see them kept in repair, whenever they may think convenient and proper, without any compensation to the owners of the lands through which they run. This it is said, is a part of the *lex terræ*—a condition attached to all freeholds, and which existed before *magna charta*. However this may be, as to compensation; in this case the Legislature have given the proprietor a mode of recovering damages, if he thinks proper to demand them, equal to the injury he may sustain.

We are, therefore, in every point of view, in which this case can be viewed, clearly of the opinion, that the decree below must be affirmed.

HIGHTOWER *versus* IVY.

The indorsement of a promissory note is the highest evidence of the nature of the agreement between the parties; and evidence of a parol agreement made at the time, varying the legal liability, is inadmissible.

Proof of the insolvency of the maker of a note, at the time of its assignment, will not excuse the assignee from the use of due diligence to collect it from such maker.

Where the maker of a note, after suit brought by the assignee, offers to pay said assignee part of the money, and he refuses to receive it, and it cannot afterwards be recovered, it is negligence on the part of such assignee, and he must, to that extent, sustain the loss.

This was assumpsit, brought by Hightower, in the Circuit Court of Autauga.

Hightower sold a slave to Ivy, who gave his note for the price. Ivy afterwards took up his note, and in lieu thereof, transferred by indorsement, a note which was payable to himself from one Maples, to the said Hightower.

The declaration contained five counts; the first of which was in the usual form upon the assignment; the second and third were also on the assignment, but they contained averments of the insolvency of Maples at the time of the indorsement, and afterwards, and of the defendant's knowledge of the fact: the fourth, was for a slave sold and delivered from the plaintiff to the defendant; the fifth, for money, and embraced all the averments of the common money counts.

It appeared from the bill of exceptions, that the plaintiff offered to prove, that at the time of the indorsement of Maples's note, the defendant promised to pay the same if Maples should fail to do so; which evidence the Court refused to admit, except with reference to the fourth count, which was on the original

sale of the slave. The plaintiff also offered to prove that Maples was insolvent at the time of the indorsement of the note; but the Court refused to admit the evidence, and on this point instructed the jury, that neither the insolvency of the maker of the note, nor the agreement of the indorser at the time, would excuse the plaintiff from due diligence in regard to demand and notice. It appeared also, that after suit was brought against Maples upon the note, he, Maples, offered to pay to the plaintiff about two hundred dollars of the amount, but the plaintiff refused to receive the same on account of the pendency of the suit. In reference to this matter, the Court instructed the jury, that if the plaintiff could have received the money or any part of it, and failed to do so, that he must bear the loss.

Judgment having been given for the defendant; on the part of the plaintiff the case came to this Court.

PICKENS, for Plaintiff—ELLIS & PECK, *contra*.

By Mr. Chief-Justice SAFFOLD:

This action was assumpsit, brought in the Circuit Court by the present plaintiff against the defendant, on a promissory note payable by S. W. Maples to the defendant, and by the latter indorsed to the plaintiff.

The first count is in the usual form upon the note; the second and third counts are also on the note, with averments of the insolvency of the maker at the time of the indorsement, and ever since, and of the indorser's knowledge of the fact: the fourth count is for a slave sold and delivered by the plaintiff to the defendant; the fifth count is for money lent and advanced, money paid, laid out, &c. and for money had and received. The plea was non-assumpsit.

From a bill of exceptions, it appears that the plaintiff introduced as evidence on the trial, the note with the indorsement as described; also, that at and before the time of the indorsement, the defendant, as indorser, agreed with the plaintiff, that if the note was not paid by the maker, he would pay it. This evidence was admitted by the Court in reference only to the fourth count, which was on the sale of the slave, and ruled to be inadmissible on either of the others. The opinion of the Court was further declared—that under the last count no evidence could be received, other than proof of *money* actually received; also, that the evidence offered, to prove that the indorser agreed to be responsible if Maples did not pay, could be adduced only under the fourth count, as it was variant from the operation of the written assignment. The plaintiff proved that after the lapse of five or six months from the time of the indorsement, the note was presented to Maples for payment, and not paid, and that about one month thereafter, he the plaintiff, notified the defendant of the fact, and urged payment of him; that defendant then agreed to return the slave, which was the consideration for the assignment of the note, and take it up, making no objection to want of diligence in regard to it; that shortly afterwards, however, the defendant refused to do so, and then told plaintiff that unless he sued Maples in a few days, he would be no longer bound as an indorser, to which he replied that no court occurred so soon, but that Maples should be sued to the first court—to which the defendant made no objection. The plaintiff then, by proper evidence, proved, that before the then next court, he did sue Maples, obtained judgment, and had execution levied on a negro as the property of Maples, which was released

on it being ascertained it did not belong to him.— The plaintiff then offered to prove that at the time of the transfer of the note, and since, Maples had been insolvent; but the Court excluded it as inadmissible. It was also in evidence that the defendant had purchased a slave from the plaintiff, and gave his note for the price, and after it fell due, transferred the note of Maples to the plaintiff and took up his own. It was also in proof, that Maples had offered to pay the plaintiff about \$200 upon his own note, which plaintiff refused to receive, because suit had been commenced upon the note. The Court then instructed the jury, that neither the agreement when the note was transferred, nor the insolvency of the maker, would excuse the plaintiff from *due diligence* in demanding payment, and giving notice to the indorser of the non-payment; and that if the plaintiff had acted so negligently that the indorser would sustain a loss by having the note returned upon him, or if he could have received the money or any portion thereof, and failed to do so, that he must bear the loss; and this was all the evidence offered and received.

The plaintiff now assigns as erroneous,

1. That the Circuit Judge refused evidence of the defendant's promise, made at the time of the assignment, to pay the note in the event the maker did not; except in reference to the count on the original consideration.

In this, the views of the Circuit Court were correct. The assignment in writing at the time plaintiff received Maples's note, is the highest and best evidence of the contract of assignment. This can not be varied or controled by any evidence of a parol agreement to the contrary, of the same date. This principle has been recognised by previous decisions of this

Court. The parol evidence was admitted in reference to the count on the original contract for the slave. The plaintiff was entitled to nothing more.

3 Stewart, 271 See *Sumerville vs. Stephenson & Johnson*.^a

2. It is also assigned as erroneous, that under the common money count, the Court held no other evidence sufficient than of money actually had and received.

The record purports to disclose all the evidence offered in the case, and shews that no *money* was either lent, paid, laid out or expended, or had and received between these parties. Had there been no evidence of the consideration of the contract, or any shewing that money had passed between the parties, the plaintiff might have been entitled to recover on the money count, unless his right was lost from his neglect to use the necessary diligence in collecting from the maker, and fixing the liability of the indorser. It is said a bill or note is evidence in support of the counts for money lent, paid, had and received; but that it is only so as between the *original* parties to it. Thus, a bill is *prima facie* evidence of money lent by the payee to the drawer, and a note, of money lent by the payee to the maker—(*Clark vs. Martin*,^b) and an *indorsement* is *prima facie* evidence of money lent by the indorsee to his immediate indorser.^c But it is clearly maintained that these instruments are but *prima facie* evidence of such consideration, and the other evidence in this case fully establishes the contrary. There seems to have been no decision of the Circuit Court against the note as evidence to this extent. I would understand the opinion of the Court on this point to have been only, that the money count was sustainable alone upon evidence of actual cash lent, paid out, or had and received, in the manner charged in the count. I would not infer from the

^a 1 Ld. Raym. 754,—1 Burr. 373.

^b Bayl. 164, 236
^c 1 Saund. P. & Ex. 273.

language of the exceptions, that the opinion of the Court was, that no other evidence would sustain the allegation of money *lent* and *advanced*, or of money *paid, laid out, and expended*, by the plaintiff for the use of the defendant, than of money had and received by the *defendant*, for the use of the *plaintiff*; but if such were the construction, still the idea of any money having passed in either way, is fully negated by the bill of exceptions. It purports to contain all the evidence, and none such is disclosed; consequently no injury could have resulted to the plaintiff from such an opinion, had it been expressed.

A further assignment of error, is, the charge of the Court, that neither the agreement by the indorser, at the time the indorsement was made, nor the insolvency of the maker of the note, would excuse the plaintiff from due diligence in regard to demand and notice.

It has already been remarked, that the parol promise, made at the time of the indorsement, can not vary or control the legal effect of the latter. The law in this respect is holden to be, that neither the bankruptcy, or known insolvency of the drawee of a bill, or maker of a note, will excuse the necessity of demand of *payment*, and notice thereof.* The presentment of bills, notes, &c. for *payment*, is a *condition precedent*, as regards the respective parties, who not being primarily liable, are in the nature of *sureties* that the parties primarily liable, will duly honor the instrument.^b Chitty recognises the principle, that neither the known insolvency, or bankruptcy of the drawee or maker, render presentment unnecessary.^c Then, it results, that neither of these grounds could excuse the want of due diligence. What was necessary to constitute *due diligence*, under the circumstan-

* 1 Saund. Pl. & Ev. 293, and authorities cited therein.

^b Chitty, jr. on Bills, 48.

^c ib. 49.

ces of this case, does not appear to have been made a question. Nor does it appear that any point was made, or any decision given, respecting the defendant's offer, (at the time he received notice of the *non-payment*,) to return the slave; or the effect, as a waiver of diligence, of any thing that then transpired; the presumption therefore, is, that if any instructions on these points were given or requested, the law was correctly expounded.

The last error assigned, is, the instructions to the jury, that if the plaintiff could have received any portion of the money, and failed to do so, on the offer by the maker to pay him, he, the plaintiff, must bear the loss.

The offer of payment, was by the maker, the primary debtor: if the money due on the note, or any portion of it, was tendered to the indorsee while he was the holder of the note; if he refused to receive it, and by means thereof so much has been lost of the debt, he is chargeable with the neglect; and according to my conceptions of the law and justice of the case, he must sustain the loss. The pendency of the suit was no objection to his receiving the money.

Judgment affirmed.

BAYLOR *versus* SCOTT.

When a sheriff sells property upon an execution, which is encumbered by a deed of trust, on which a sum of money is to fall due some months after the sale, the sheriff cannot legally adjust the trust debt, of his own authority, by paying the money to become due upon it, out of the proceeds of the sale.

The plaintiff in execution—not the sheriff—is entitled to the benefit of a trust deed on paying off the debt secured by it; and the trustee will be bound to execute the trust.

Where a sheriff, in his return, offers an excuse for not paying over the whole of the money, which is insufficient, the Court would be bound to disregard such excuse, in a proceeding against the sheriff.

In a proceeding against a sheriff, his own return is not conclusive in his favor, either as to the law or the facts involved.

The act of 1807, giving a defendant in execution a summary remedy against a sheriff for failing to pay over an excess collected by him on such execution, provides that such defendant shall have the same remedy that plaintiffs in execution are entitled to against a sheriff, for failing to pay over money collected; but that act must not be so construed as to extend to defendants in execution the remedies provided for plaintiffs in execution, by subsequent statutes, whereby the limitation as to the time of commencing the proceeding is omitted, the time of notice abridged, and the penalty increased.

The act of 1807 is to be construed with reference to laws then in existence.

Baylor, who had been a defendant in execution, instituted a proceeding, by motion, in the Circuit Court of Jefferson, against Scott, the former sheriff of that county, for failing to pay over a sum of money, which he alleged, the said sheriff had received on the execution, beyond what was sufficient to satisfy it. The judgment against Baylor was for \$749 22 cents, besides \$51 26 cents costs. In virtue of an execution issued thereon, Scott, the sheriff, sold property to the value of \$1047 87 1-2. In reference to two slaves, part of the property sold, the sheriff's return shewed that they were sold subject to a deed of trust in favor of one Steel, for \$398 39 1-4; that the whole of the property sold amounted to \$1047 81 1-4;

leaving, after deducting the claim under the deed of trust, \$649 39 1-4 to be applied on this execution.

The plaintiff in the motion objected to the authority of the sheriff to adjust any demands but that of the execution. In urging this objection, he offered the deed of trust in evidence, to shew the true amount due on it, and the time when it became due. He also offered to prove that he did not owe Steel part of the amount set forth in the return, and that the plaintiff in execution had not purchased the trust debt: all which evidence the Court rejected; and decided that the sheriff's return was conclusive as to the matters set forth in it; and that the return not shewing a surplus or excess, the motion could not be sustained.

The notice given to Scott of the motion to be made against him, purported to have been given during the same term at which (on the fourth day thereof) it was to have been made.

The parties appeared, and the motion was continued. About two years had expired from the time the execution was issued, until the time when the motion was brought.

The questions presented for the decision of this Court, involved the legality of the instructions given and refused by the Court below; and that of the judgment in overruling the motion.

CRABB, for Plaintiff, insisted—that as it appeared from the return that there was an overplus, the sheriff in such case, could not save himself from a judgment against him, by shewing how he had disposed of the money, otherwise than by paying it over.

That the sheriff's return is conclusive in his own favor, (said he) is an extraordinary doctrine; and

one that will certainly not be sanctioned by this Court. What right had the sheriff to pay away the money to satisfy our debt? We had not made him our agent for that purpose. But the return in fact shews, that the property was sold subject to the lien of Steel. If this is to be taken according to the plain import of the language, the property was sold in its encumbered situation, and was still liable for Steel's debt; yet the sheriff took it upon himself to pay it out of the money he had received from the sale, lessened as that amount had been by the lien! He might as well state in his return, that he had disposed of the surplus for charitable purposes, or that he had scattered it to the four winds of Heaven. Deeds of trust are often matters of grave investigation before courts of justice: had the sheriff a right to assume the character of a judicial officer, and to determine on the validity of this deed of trust? Had he a right, also to pay it before it was due, out of the debtor's money, without his consent? There is a law authorising the plaintiff in execution to pay off a lien previous to sale; but he cannot still take the property out of the hands of the trustee: he can only thereby put himself in the place of the *cestui que trust*. The sheriff can find no justification for his proceeding under this act.—*Aikin's Digest*, 208. But, under the charge of the Court, it seems to have been of no consequence what disposition the sheriff had made of the money not paid over, provided he set it forth in his return. If he had thrown the money away, and had so returned it, it would have been equally available with the payment of Steel's debt.

The record of a former motion of Baylor against Scott, was introduced in evidence. In that case Baylor moved the Court to have the judgment entered sa-

tified. Baylor was unsuccessful; but the motion went off on a matter of abatement. The point in controversy there, could therefore be no defence on the ground of former trial.

1 *Starkie* 191, 198, 195, 199, 201—10 *Viner's Abr.* 446—3 *Wilson*, 240—*Norris's Peake*, 64.

PECK, *contra*, urged, that if on considering the entire case, this Court should be of opinion that the Court below came to a right conclusion, although some points may have been decided wrong; they will nevertheless affirm the judgment. Taking the sheriff's return altogether, and permitting it to explain itself, it will be apparent that the property was not sold *subject* to the lien, although that word is used. It is plain from the connexion that the meaning was, that the property was sold for a certain amount, subject to a deduction (from the amount) of the debt to Steel, secured by deed of trust. The amount for which the property was sold also illustrates the meaning. It was sufficiently large to free the property from incumbrance.

But the plaintiff mistook his remedy. By the act of 1807, the defendant in execution is allowed the same remedy against the sheriff that was allowed to the plaintiff in execution. This same act gave the summary remedy in favor of the plaintiff in execution. This act, which is the only one on which the defendant in execution can rely, required the party making the motion, to give the sheriff ten days previous notice of the same; and the motion must be made at the next succeeding term of the Court, when, if judgment was rendered against the sheriff, it was for the amount in his hands, and fifteen per cent. per annum, until paid. The plaintiff in the motion has

not come up to the requirements of this law, either in the time of notice given, or in the time of commencing the proceeding; yet this is the only law that gives a summary remedy to the defendant in execution. This law, making the remedy the same as that in favor of the plaintiff in execution, could not be construed to refer to future laws that might be passed in favor of such plaintiff. Yet the plaintiff in this motion seems to have intended to proceed under a subsequent act in favor of the plaintiff in execution, which increases the penalty against the sheriff. Surely, the Legislature in providing a remedy against a sheriff for neglect of duty, and in affixing a penalty, did not look into futurity, and designedly make that remedy and that penalty depend on a contingency. In penal laws there should be all possible certainty. The reason of the case may illustrate the meaning of the Legislature. It would surely be wrong that the defendant in execution should have it in his power to postpone the remedy for three, four, or five years, and then make his motion and recover the amount with five per cent. per month, in the way of damages. But by the act of 1807, if the summary remedy was resorted to at all, it must be at the next Court. In this case, the party delayed proceeding nearly three years: he thereby lost his right to proceed in this summary way.

By Mr. Chief Justice SAFFOLD:

This was a proceeding instituted by motion in the Circuit Court, by the plaintiff in error, against the defendant, as late sheriff of Jefferson county, for failing to pay over to said plaintiff in error, who was defendant in an execution, a certain sum of money, which it was alleged said sheriff had levied and collected out

of the plaintiff's property, it being an excess over the amount necessary to satisfy the whole judgment, with interest and cost; and which, on demand, had been refused.

The facts, as disclosed by the record, are the following. At October term, 1830, of the Jefferson Circuit Court, a judgment was rendered in favor of McGregor & Darling against Baylor, the plaintiff in error, for \$749 22, besides \$51 26 cents costs of suit, upon which a *fi. fa.* was issued to Scott, as sheriff: by virtue of this execution, he levied upon and sold property of the plaintiff to the value of \$1047 87 1-2. Part of the property thus sold, consisted of a negro boy about ten, and a girl about twelve years of age, the proceeds of which amounted to \$650.

In reference to these two slaves, the sheriff returned upon the execution, that they were sold to the plaintiffs in execution, by their agent—(subject to a deed of trust to Thomas M. Adkins trustee, to secure a debt to Maj. J. Steel, for \$356 69; due four or five months thereafter, with interest for twelve months, and the costs of said deed, and twelve dollars for the hire of the boy for three months, he having been hired by the defendant in execution, before the levy, for that time, and the wages paid to him, making the whole lien of Steel \$398 39 1-4.) The return also stated the proceeds of other property levied upon and sold at the same time, making with the sum mentioned \$1047 81 1-4 cents, and leaving, (as the return reads,) after deducting the claim under the deed of trust, &c. \$649 39 1-4 to be applied on this execution.

It is also shewn, that on the trial of the motion, the plaintiff in error, in urging his objection to the authority of the sheriff to adjust the demands mention-

ed, other than the amount of the execution, and to the manner of his doing so, offered in evidence said deed of trust, to shew the true amount due upon it, and the time payable ; also offered to prove that the plaintiffs in execution had not purchased the trust debt, and that he did not owe Steel the twelve dollars, allowed as hire for the boy ; all which evidence the Court rejected. He then moved the Court to disallow these last mentioned payments ; but the Court overruled the motion, and decided, that the sheriff's return was conclusive as to the matters set forth in it, and that the return not shewing a surplus or excess, the motion could not be sustained.

From the bill of exceptions it further appears, that in bar or opposition to the motion, the defendant introduced as evidence, a record, shewing, that a previous motion had been made in the case of *McGregor & Darling vs. Baylor*, at the instance of the defendant, against said sheriff, to compel him to enter a credit on the execution to the full amount for which all the property levied upon, had been sold, and that the motion had been overruled.

Upon consideration of the case now before us, this motion was also overruled.

The present plaintiff assigns for error various causes ; embracing—

1. The rejection of his evidence, shewing the circumstances under which the sheriff had allowed, and paid, other demands than the execution.
2. The decision, that the sheriff's return was conclusive evidence as respects the matters therein contained, so that no excess in his hands could appear.
3. The judgment overruling the motion.

According to the views we entertain of the law governing motions of this kind, a brief investigation

of the subject will suffice ; especially of the two first points presented for consideration.

If it were conceded that the sheriff had authority to adjust the trust demand, and extinguish the supposed lien under the deed, it would follow as a necessary consequence that his conduct would be subject to legal scrutiny for any alleged abuse of that power. If while liable to the summary redress for failing to pay over money made on an execution, or to restore an excess, he shews by his return a different application of the money, the Court would be competent to investigate the circumstances, so far at least as disclosed by the return and other parts of the record, and if it appear to have been misapplied; to hold him responsible, as in case of payment in his own wrong; or should it appear that a sheriff has assumed a judicial power, or private agency, with which he was not clothed ; and by his official return he offers the exercise of this, as an excuse for not accounting for money which he otherwise should, the Court would be bound to disregard the excuse, and decide the case as if unconnected with it. The cause stated in this return, of there being no excess, is, that the sheriff gave a priority to a trust debt, &c. having sold the property subject to that lien. Was he authorised to do so ? It is provided by statute,* that a plaintiff in execution may have the benefit of a deed of trust, on paying off the debts secured by it ; and on such payment shall be placed in the situation previously occupied by the person for whose benefit the trust was executed, and the trustee shall execute the trust for him in the same manner. Thus it appears, that if these plaintiffs in execution had paid off the trust debt, the trustee alone, pursuant to the directions of the deed, not the sheriff, by virtue of an execution,

*Aik. Dig. 203.
sec. 6.

was authorised to adjust the demand. But in this case it does not even appear that the trust debt had been extinguished, or in any manner transferred; the contrary presumption exists. The remark is also due, that the language of the return, so far as it speaks of the slaves having been *sold subject to the deed of trust*, seems to import a sale of the property under the incumbrance, with notice that the lien was to continue, and be subsequently enforced against the property. Other parts of the return explain that the contrary course was pursued, but as we think, without the authority of law. That a sheriff's return is not conclusive in his favor, in a direct proceeding against him, in relation to either the law or facts involved, is equally clear.

The foregoing reflections have been made, not for the purpose of shewing any wilful dereliction on the part of the sheriff, or even that injustice has been done, but to shew, that the authority of the sheriff has been mistaken and transcended; and that if from other considerations we should not feel authorised to reverse this judgment, the principles of the decision below have not our sanction.

It is only necessary farther to enquire, if the plaintiff in error was entitled to redress at the time and in the manner sought by his motion? The right is not contended for, otherwise, than on the authority of the statute. The only statute relating to the right of a defendant in execution to obtain restitution of any excess of monies collected against him, is the act of 1807.* This act provides, in such case, that if the sheriff fail or refuse to pay such excess or surplus, when required, he "shall be liable to the like penalty and judgment in favor of the debtor, as is prescribed and directed by law, in favor of the plaintiff against

*Aik. Dig. 162.
sec. 13.

*Aik. Dig. 173,
sec. 74.

the sheriff, for not paying the principal, interest, and costs, levied on an execution." Another section of the same act, (the law above referred to) in prescribing the mode of redress to the plaintiff in execution, against a sheriff who has actually made the money on execution, or rendered himself responsible for it, as in case of a voluntary escape, provides, that it shall be lawful for the creditor or plaintiff in execution, upon a motion, made *at the next succeeding Court* from which such writ shall issue, and on ten days notice given, to demand judgment against such officer for the money mentioned in such writ, or so much as shall be returned levied thereon, with interest at the rate of *fifteen per centum per annum* thereon, from the return day of the execution, until the judgment shall be discharged, and such Court shall award judgment and execution accordingly. It may be observed, that in this proceeding the plaintiff in error has failed to pursue the course prescribed, in two respects. Instead of the ten days notice as required by the statute, the notice purports to have been given during the same term at which, on the fourth day thereof, the motion was to have been made: in fact, the motion was entered on the rule docket, bearing equal date with the notice. But as the parties are shewn to have appeared to the motion at the first term, and it does not appear that the sheriff objected to the notice, but that the cause was continued until the next term, let it be conceded that this defect, if otherwise available, has been waived. Then how stands the other objection, that the motion was not made at the *next succeeding Court* from whence the writ issued, but two years or more thereafter.

*Toul. D. 316,
sec. 16.

The act of 1819,^b prescribes no form of remedy, being only declaratory of the sheriff's duty, and of

the amount of penalty incurred by his failure to pay the same over to the party entitled: it therefore can afford no aid in the determination of this question.

The act of 1826,* is the only remaining one which can be supposed applicable to this case. It provides, in substance, that whenever any sheriff shall fail or refuse to pay over any money collected by him upon any execution, on the application of the *plaintiff*, it shall be lawful for the Court, upon one day's notice being given to said sheriff, and on motion of the plaintiff in execution to render judgment against the officer thus failing, and his security, or any or either of them, for the amount of money thus received, together with five *per centum* upon the amount of the execution, as damages for each and every month detained.

*Aik. Dig. 174.
sec. 76.

Now, the enquiry arises, does the act recited, of 1807, providing for the restoration to the defendant in execution, of any excess of money collected, entitle him to the same remedy prescribed to plaintiffs in execution by the statute of 1826, last referred to? The penalty is materially different, having been raised from *fifteen per cent. per ann.* as by the former, to *five per cent. per month* as authorised by the latter act: also the notice has been reduced from ten days to one. It is in the nature of a penal statute, requiring a strict construction. If it can be applied for the benefit of defendants, as nothing of the kind is therein expressed, it must be by implication, and on the principle alone, that the Legislature has substituted the latter act for that section of the act of 1807, to which, defendants, by a different section of the same act, were referred for their remedy, in case of any surplus or excess withheld from them, both which provisions have already been quoted. If by fair

construction, the early act provided for defendants in reference to excess, not only the cotemporary remedy allowed to plaintiffs in execution, but also any modifications of it that might exist when subsequently resorted to, the changes in the statute would inure equally for the benefit of defendants: but is such construction warranted? The language of the early statute as already quoted, is, that the sheriff "shall be liable to the like penalty and judgment in favor of the debtor, as *is* prescribed and directed by law in favor of the plaintiff,"—not, as *is*, or *may be* prescribed.

It is necessary to notice another difference between the remedy, as prescribed by the early and late statutes referred to, or at least, in the express provisions of the two: it is that to which I have previously adverted, that the act of 1807 authorises the summary proceeding only "upon a motion made at the next succeeding Court" from which such writ issued; when that of 1826 contains no express limitation of the time for making the motion. It may be a question whether the several statutes on this subject, should not be regarded as acts in *pari materia*, so as to extend the requisition to them all, even in respect to plaintiffs, that the motion shall be made at the next succeeding term of the Court from which the execution issued. This, however, is not a question now presented for consideration, and no opinion is intended to be intimated upon it. But with reference to the debtor or defendant in execution, the act of 1807, containing his only authority for restitution to an excess, in the summary mode, he must adopt that remedy, if at all, within the time prescribed. We can not, on the principle of the statutes being in *pari materia*, disregard the time, and apply the provisions of the

subsequent act to the case of debtors ; reasons, to the contrary are, that the relief to debtors or defendants in execution, is not mentioned in the latter, the remedy is more rigorous, and is of a penal character, and the limitation of time is not expressly waived by it.

It can not be maintained that the defendant in error has waived this objection. True it is, that he appeared and made defence to the motion in the Circuit Court, and it is not shewn that he claimed this exception ; but he being successful below, was under no necessity of spreading the exceptions he may have taken to the decisions of the Court, upon the record, and nothing appearing of record can have the effect to negative the idea that he may have urged this objection to the Court, and been overruled ; if he did, the plaintiff's bill of exceptions would not necessarily shew it. Besides, the limitation in this respect, stands on a principle different from the ordinary limitation of actions ; in respect to the latter, a subsequent promise to pay, would constitute a waiver of the defence, and by the rules of practice defendants are required to plead it, so that their failure to do so, implies a waiver. Here, the question relates not to the right involved, but to the summary jurisdiction of the Court, and we think the failure to plead this matter does not constitute an estoppel. Advantage of it is now claimed in argument, and this ground alone was sufficient to have justified the decision of the Circuit Court, overruling the motion ; that different reasons were there given for the decision does not vitiate the result. If the judgment should be reversed, and the cause remanded, there is nothing to prevent the defendant in error from availing himself of this objection to the remedy on a future trial.

We are therefore unanimous in the opinion that the judgment must be affirmed.

DOBBS, *et al.* versus DISTRIBUTORS OF COCKERHAM.

The Orphans' Court, in this State, has jurisdiction in a case of administration, where the truth of an inventory is contested; and may try and decide the question, whether, or not, certain property belongs to the estate.

In settling a contest of this kind, the Orphans' Court has authority to summon a jury to determine questions of fact, on which the parties interested may be at issue.

Where, in such a case, it is decided that certain property, not embraced in the inventory, belongs to the estate, the Court has power to direct a division of such property among the distributees; or if that cannot be done, a public sale of the property should be ordered, as provided for by the statute, and the proceeds of such sale should be divided, and it is error for the Court at once to give judgment against the administrator in *cash*, in favor of the distributees, for the value of the property as assessed by the jury.

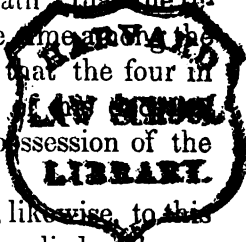
The jurisdiction extended to the County Court in cases of this character, does not deprive parties of their remedy by action on the bond, or by bill in chancery.

This case came to the Supreme Court, on the final decree of the Orphans' Court of Pickens, in relation to the settlement of an estate.

Dobbs and Cockerham, administrator and administratrix, of the estate of William W. Cockerham, having been required to make final settlement and distribution of the estate of their intestate, the defendants in error, heirs of said estate, filed a statement, alleging, that the administrator and administratrix had not made a complete inventory of the estate; that certain slaves mentioned and described in the statement, had been wholly omitted, and no return

made thereof, and that the said slaves had gone into the possession of the said plaintiffs in error.

A demurrer having been tendered on the part of the administrator and administratrix to this statement, and it being disclosed to the Court that no inventory had ever been filed, the demurrer was overruled, and leave given the representatives to file an inventory, and to answer to the statement.

The answer of the plaintiffs in error, set forth, that the slaves mentioned in the statement of the defendants, were not of the estate of their intestate, but had been loaned to him during his life time, and properly belonged to the administratrix and her children: that only four of the said slaves were in the possession of the intestate at the time of his death: that the residue had been distributed in his life time among the children of the administratrix, and that the four in possession of intestate at the period  had since that time remained in the possession of the administratrix, as her own property.

The defendants in error demurred, likewise, to this answer, which being overruled, they replied, on leave, denying the loan, &c. and averring the slaves to be the property of the estate, and subject to distribution.

After a demurrer to this reply, issue was joined upon these allegations, and a jury being summoned to try the facts, they found the four slaves above mentioned, subject to distribution, and assessed their value and the value of their hire, while in possession of the plaintiffs.

A motion in arrest of judgment having been then argued and denied, the Court rendered a final decree, including a decision upon the whole value of the estate, as before inventoried and sold, and the amount of the verdict of the jury; and gave judgment for a

certain amount in money, in favor of the distributees of Cockerham's estate.

To reverse this decree the plaintiffs took their writ of error.

PECK, for Plaintiffs in error—Argued, that the distributees, in proceeding against the representatives of the estate, mistook their remedy; and the Court mistook its powers.

The County Court for the transaction of orphans' business, (he said,) is a Court of special jurisdiction. It has not general common law powers. If we would know what such a Court may do, we must look to the statutes from which its powers are derived. It can exercise no powers but such as have been expressly delegated to it. It may be true, that a revising tribunal will not be very strict as to the formality of the proceedings of such a Court as this, provided it keep within its jurisdiction; but it will be held to strictness in regard to the limits of its jurisdiction.

We have no law authorising this Court to enquire whether certain property did, or did not, belong to the estate. It became the duty of the representatives, to return to Court within three months, an inventory, upon oath, of the goods and chattels, rights and credits, of the estate of the intestate; which, if received by the Judge, was to be made a matter of record. Such record cannot be afterwards impeached, except for fraud.

The inventory became the foundation, on which the settlement and decree should have been made. With the sale bill, it forms the foundation of all the subsequent proceedings. A notice is required to be given of the time of the settlement. At this time the parties interested, may come in and make their ob-

jections to the account stated. And then the Judge is not to call a jury and try the issue, but he is to hear all that is to be said; and, if it seems to be necessary, he may re-state the account; or he may appoint auditors, before whom the parties may appear, and make their statements and explanations. These auditors may then re-state the account, and return the same to Court. Such is the mode pointed out by the statutes; but we find nothing there to justify this proceeding. There are cases in which a Court may impanel a jury, as in a case of contempt in assessing a fine; also, where it shall be suggested that the administrator has appropriated to his own use *a portion of the funds* of the estate, which is denied by the administrator on oath. These, perhaps, are the only two cases where the Court possesses the power. The funds here spoken of must be money: it must be the funds of the estate. The return shews what these funds are. In such case a jury may be called; but the Court cannot impanel a jury without express authority.

Where a question arises, whether certain property does, or does not belong to the estate, the persons interested can have the question investigated, and the administrator is entitled to a common law trial.

But can the Court go back, behind the inventory, and raise a question as to the right of certain property, whether it belonged to the estate, or to the representative in another right? I contend that the County Court has no such power.

But if the jurisdiction of the Court were admitted, the proceedings would still be erroneous. The verdict goes beyond the issue, and the judgment beyond the verdict. The only issue was, did certain slaves belong to the estate? The jury find that a part of

them did belong to the estate : they find also the value of those slaves, the time they were in the possession of the administrator and administratrix, and the value of their hire for that time. And the Court, instead of directing that these slaves should be embraced in the inventory, and go in the ordinary course of distribution, gave judgment against the administrator and administratrix, for their value in money, and also for the amount of their hire.

SHORTRIDGE, *contra*.—There has been a settlement of the estate. If there should appear to be error as to the four negroes (but I contend there was none) there would be no need of overturning the entire settlement, or otherwise disturbing the final distribution of the estate, except as to those slaves.

The most important question is, whether the Judge of a County Court has a right to call on an administrator to make settlement for property, belonging to the estate, not embraced in the inventory, as well as for property that is so embraced? Is the Judge limited to the inventory and sale bill?

^aAik. Dig. 252. By reference to our statute,* it will be seen that the County Court, as to final settlement and distribution of the estate, is one of extensive and ample jurisdiction. And my Lord *Coke* says, that wherever a power is granted, all is granted that is necessary to carry the power into effect. It does not vitiate the proceedings that the Judge called in the aid of a jury. If the statute had not given that power, it would still have been incidental to the power granted. If the Judge had the right to settle the matter, he had a right to call in aid—whether you call that aid jurymen or auditors. But the act authorises a jury in any case where it may be necessary. The Judge,

in this case, was more regular and formal in his proceedings than in the County Court. He required a statement, and a regular issue to be made up between the parties.

If the act had not given the power of summoning a jury, &c. yet the Judge would have had the power in the way it is possessed by a chancellor, who may at any time have the aid of a master, of auditors, or of a jury, as to matters of fact. The Judge might have decided all he did decide, himself: is there, then, any reason for overturning the proceeding, because, out of abundant caution, he called in the aid of a jury?

As to the final judgment or decree being erroneous, I contend that it was the fault of the administrator and administratrix, that this property was not embraced in an inventory, and could not, therefore, go in the ordinary course of distribution; they were, therefore, liable to a judgment against them for the value of the slaves, and the amount of the hire in money.

By Mr. Justice HITCHCOCK :

The plaintiffs in error, who are administrator and administratrix of William W. Cockerham, deceased, were cited before the Judge of the County Court of Pickens county, to make final settlement of their administration, and to make distribution of the estate among the heirs. At the hearing before the Judge in October, 1833, the defendants in error, a part of said heirs, filed a statement as follows :

“ The distributees, in the above case, allege and aver, that the said administrators have not made a true and perfect and complete inventory of the personal estate of their intestate, but that they have neg-

lected and omitted to return in said inventory, the following negroes, to-wit, Hannah, &c. (some nine or ten in number.) The distributees farther allege, that the aforesaid negroes came to the possession or knowledge of the said administrators, and ought by them to have been embraced in their inventory of the estate of their intestate, and should go in course of distribution among the distributees."

To this statement the plaintiffs in error demurred; and it appearing that they had not filed any inventory, leave was then given them to file one, which was done, and which was recorded.

On argument, the demurrer was overruled; and leave was given them to answer or plead to issue; which, at their request, they were to make under oath. Leave was also given the distributees to file an amended statement; and leave being given to either party to have subpoenæs, and commissions for testimony, the case was continued to January, 1834, at which time the administrators filed their answer, in which they state,—

"That the intestate, before his marriage with Nancy Cockerham, (who is one of the respondents) was intermarried with another woman, since deceased, by whom he had children, towit, the said Wm Cockerham and — Cockerham, who, by her intermarriage with Elsey Hunt, became the mother of Wm. and Huron Hunt, who, in this cause, appear in the character of complainants, under the denomination of distributees of William W. Cockerham: that after the decease of his first wife, William W. Cockerham intermarried with the said Nancy Cockerham, daughter of Elisha Estis, by whom he had children, to-wit, Catharine Cockerham, now Catharine Dobbs, Polly Cockerham, now Polly Dobbs, Patsey Cocker-

ham, now Patsey Shannon, and Elisha Cockerham : that after his intermarriage with the said Nancy Cockerham, the said Elisha Estis did, for reasons not certainly known to these respondents, lend or give to the said William W. Cockerham and his wife, the said Nancy, the aforesaid negro woman Hannah, and upon the condition, that the said Hannah and her increase or offspring, should, after the termination of said loan or gift, or after the death of the survivor of the said William W. Cockerham and Nancy his wife, be the property of the children of the said Nancy Cockerham : that the said William W. Cockerham, in his life time, on the 15th October, 1806, acknowledged in writing, under his hand and seal, (which writing is ready to be produced) that said negro Hannah was loaned to him, and that he never had any right, title, claim, or demand to the said Hannah, or to her increase, but that they did, and ought of right and justice to belong to the children of his then wife, Nancy Cockerham, which children are the persons above named : that at the time of the death of the said William W. Cockerham, there were in his possession, only Hannah, Martin, Frank, and Lucy, of her increase ; the others of her increase, had previously been distributed among the children of the said Nancy, by the authority which they believed they possessed under the terms of the original gift or loan : that the said negroes, nor any one or more of them, have never been in the possession or knowledge of the respondents, as administrator and administratrix, as part of the estate of the said William W. Cockerham, but that they have ever been in the possession of those to whom they were distributed as aforesaid, in the life-time of the said William W. Cockerham, except the four, which as afore-

said, were in the possession of the decedent at the time of his death, and since then they have remained, and still are, in the possession of the said Nancy Cockerham, as her rightful property, during her life-time according to the terms of the original gift or loan, and then to become the property of her children."

To this answer, the distributees filed a demurrer, which upon argument was overruled, and leave given them to reply; upon which they filed a replication, stating that the said Hannah was not given as a loan, but absolutely, and without condition or limitation; that the negroes were all in the possession of the decedent in his life-time, and at the time of his death, and that they are subject to general distribution among all the heirs of the said decedent, and not exclusively among the children of the said Nancy Cockerham; they deny all the allegations in the answer, and put themselves upon the country.

To this replication, there was a demurrer, which was overruled, and the administrator had leave to join issue, which was done, and the sheriff was ordered forthwith to summons and impanel a jury of bystanders, to try the issue, which was done, and a verdict was rendered, finding the four negroes subject to general distribution, as a part of the property of the estate of William W. Cockerham; the jury also assessed the value of each negro, and the value of the hire of each, during the time they had been in the possession of the administrator and administratrix. A motion was then made to arrest the judgment of the Court, which was overruled, and the Court then proceeded to render judgment, as well upon the verdict as upon the evidence adduced, and taking the value of the estate previously inventoried and sold, and the value of the negroes and their hire, as assessed by the jury.

proceeded to decree distribution in money to the various distributees, fifteen in number, and directed executions or attachments, as might be required, to enforce the decree of distribution.

This case has been brought by writ of error into this Court, and several assignments have been made and argued. The first question which will be noticed in the view which the Court has taken of the case, is—Whether the County Court has jurisdiction, in a case where the truth of an inventory is questioned, so far as to try the right of property? This cannot be done by the ecclesiastical courts in England. An inventory is there required for the benefit of creditors, legatees and parties in distribution, and it must, by statute of 21 Henry VIII, be exhibited on oath, which the ordinary is bound to receive. The creditor may state objections to the inventory, which the party is bound to answer upon oath, but no evidence is admissible to contradict the answer. If the creditor be still dissatisfied, he may have recourse to equity for relief;^a and it appears that legatees and distributees, though they may require an account from the administrator in that Court, cannot dispute there, the truth of the inventory.^b When a question of this kind is raised, the party is entitled *ex debito justitiæ*, to an assignment of the administration bond, and to sue in the name of the ordinary, when he can assign as a breach, the not exhibiting a true inventory.^c That Court having neither Common law or Chancery powers, is prohibited from taking jurisdiction.^d

^aToller on Ex.
252—3 Burr.
1942.

^bToller on Ex.
493.

^cib. 495.

In the case of the *Selectmen of Boston vs. Boylston*,^e the Court say, "that upon consideration we are all of opinion, that the Probate Court in adjusting an account exhibited by an executor or administra-

^d2 Fonbl. Eq.
418.

^e4 Mass. Rep.
318.

tor, are competent, having satisfactory evidence before them, to require an allowance of assets not inventoried or credited. But they say farther, that in the exercise of the authority, the Probate Court ought to employ its discretion in rejecting or suspending the account; that the party may have his remedy at law, by allowing him to prosecute his remedy upon the administration bond. The reason assigned by the Court is, that to proceed in that summary way, would deprive the party of the advantage of a trial upon more formal proceedings and before a jury, to determine the facts contested; and upon the whole view of that case, the Court directed a trial at law upon the bond. They admit, however, the power of the Court to proceed.

43 Pick. 484. In the case of *Higbee, et al. vs. Bacon, adm'r.*, the Court decided, that the party at whose instance interrogatories have been proposed in the Court of Probate, to an administrator touching his account, has a right to offer evidence to disprove his answers: in this case, the charge was, that the administrator had concealed monies and goods belonging to the estate.

We have looked into all the American authorities which we can find here, but do not find any cases in the other States, on the point. The most ordinary course appears to be, to proceed by suit on the administration bond, or by bill in Chancery. The question is one of great practical importance, and is entirely new in this State, so far as we are advised. Upon a consideration of the case, however, and an examination of our statute, we are of opinion, that the Court has jurisdiction, and that it was properly exercised in this case.

The Judges of the County Courts in this State, sitting as Judges of Probate, have all the powers of

Courts of Ordinary in England, and by statute, various other powers are given to enable them to settle, and finally adjust every question that can arise in relation to estates.

By the act of 1821,* executors and administrators are required, within three months, to return, under oath, a full inventory of all goods and chattels, rights of and debts due or accruing to the testator or intestate at the time of his death, which have come to their knowledge or possession; setting forth the times at which they are due, and whether by open account, promissory note, or bond; which is to be recorded. The Judge of the Court is to examine and audit all the accounts of ex'rs and adm'rs for final settlement, giving forty days notice of the time and place to all persons interested in the accounts, and if any person interested in the settlement shall make exception to the report of the Judge, the Court shall proceed to hear the proofs and allegations, and correct or amend the errors or mistakes, or refer them to auditors to do the same, who are to make report at the next term of the Court, of their proceedings, for confirmation.

By the 24th section of the act of 1821,* the documents and evidence of all settlements made with executors and adm'rs, are to be carefully preserved by the clerk, and the *settlement* entered of record; which evidence, vouchers, documents and *settlement* shall be good evidence in any suit for or against the executors and administrators, and shall not be impeached, except for *fraud in obtaining the same*.

By the sixth section of the same act, (page 251,) the Court may, in all cases where it may be necessary, to have *any matter before it tried by a jury*, order the sheriff to forthwith summon and impanel a jury,

*Aik. Dig. 182,
sec. 26.

*Aik. Dig. 252,
sec. 32.

to try the facts: and by the first section of an act of 1830, (page 252) all decrees by the Orphans' Court, on *final settlements* of the accounts of ex'rs or adm'rs, shall have the force and effect of judgments at law, and executions may issue for the collection of the several distributive amounts against them; and when distribution of real or personal estates is decreed by the said Court, each distributee, heir, or devisee, may and shall have his or her writ of execution or attachment—one or both in the case of personal estate, and in case of real estate, a writ of *habere facias possessionem* against the executor, administrator or guardian: and by the second section of an act passed in 1832, where an execution against an executor or administrator, on a final settlement, is returned *no proper-ty found*, execution may issue on the bond.*

*Aik. Dig. 233, sec. 40.

The power to examine into the facts growing out of a contested inventory, is not expressly given; but the power to adjust and audit all accounts of administrators, we think, embraces the case. The inventory is a part of the account. The settlement, when made, is to be final, and to have the effect of a judgment. A jury is authorised to try every contested fact, as fully as it can be done before the Circuit Court, and a specific execution of the decree, when property is withheld, can be had by attachment. This remedy is much more speedy, and equally as safe to all parties, as the action at Common law, or a bill in Chancery. Every question of law that can arise, can be reserved by bill of exceptions, and the revising power of the higher tribunals is equally open to the parties, as in other cases. We, therefore, do not feel at liberty to deny to the Court, the jurisdiction it has exercised in this case.

By this opinion, we do not, by any means, intend to deprive distributees, &c. of the remedies by action on the bond, or by bill in chancery. They are undoubtedly concurrent, and the administrator may be proceeded against in either way.

We are of the opinion also, that the administrators were properly subjected to the payment of hire for the time the negroes were in their possession, and that there was no error in the mode in which the amount was ascertained.

But we think the Court did err, in charging the administrators with the value of the four slaves, as found by the jury, and in making distribution in cash. By the verdict, the negroes were found subject to distribution, and should have been divided among the distributees, or if that could not be done, they should have been ordered to be sold at public auction, under the first section of the act of 1820,*

* Aik. Dig. 155.
§ c. 12.

It is, therefore, the opinion of the Court, that the decree of the County Court be affirmed, except as to that part which charges the administrators with the value of the slaves, and the distribution made under it, and that, as to that, the same be reversed and the cause remanded.

BARR *versus* WHITE.

Although the Supreme Court will not examine into the merits of an application to an inferior Court, for a new trial ; yet the competency of such Court to grant it, is a proper subject of revision.

By the practice of the Courts of this State, the term of the Court is the limit within which the power of granting new trials is to be exercised.

Whether in a proceeding before a Justice of the Peace for forcible entry and detainer, the Justice has the discretionary power of granting a new trial on merits—*Quære*.

Where, after a judgment for defendant, on unlawful detainer, a Justice, (after three days consideration) granted a new trial to plaintiff, and gave a new judgment, without notice to defendant ; held to be error.

White, the defendant in error, instituted a proceeding for unlawful detainer, before a Justice of the Peace in Pickens county ; which, on trial by a jury, resulted in favor of the defendant. Several days after the rendition of the judgment, the Justice, considered and granted a new trial to the plaintiff, and thereon the latter obtained a verdict. On *certiorari* to the Circuit Court, the decision of the inferior Court was affirmed, and the defendant brought the case to this Court, by writ of error.

By Mr. Justice THORNTON :

This was a proceeding had under the statute of forcible entry and detainer, by which a Justice of the Peace is constituted a special Court, to try that matter. It was brought by *certiorari* into the Circuit Court, where upon motion to dismiss the errors assigned, they were so dismissed, (as the record states it) and judgment entered in affirmance of the judgment of the Justice of the Peace. It is not material, I apprehend, that the mode of trial in the Circuit Court, was by *motion, as stated*, instead of, upon a formal joinder in error. The result, which was an

affirmance of the judgment of the Justice, is all that we deem it important to consider.

There were many matters assigned for error on the record of the proceedings had before the special Court; but we think it is unnecessary to notice more, than relates to the granting of the new trial by that tribunal, as is set forth on the record.

It appears, that on the 25th of January, 1833, a trial was had, and concluded by a verdict, and judgment entered thereon, and signed by the justice. That on the next day a motion was made, upon an affidavit of surprise, by the defendant in error, for a new trial. Argument is heard on this motion by the attorneys of both parties, and the Justice takes an *advisare*. Three days thereafter, viz. on the 29th of the same month, he determined to grant the new trial, and informed the parties of this determination. The record shews, that on the 9th of February following, a second trial was had, at which there was no appearance by the plaintiff in error, though solemnly called. The only notice, or proof of knowledge on the part of the plaintiff in error, that the 9th of February was the time, at which this second trial was to take place, which the record discloses, is a process issued by the Justice, commanding the sheriff to summons him, to appear and defend, and on the 25th of January, 1833, which was an impossible time.

The statute creating this special Court for the trial of forcible entry and detainer, does not expressly grant the power of allowing a verdict to be set aside after being rendered, and a new trial to be had. It is entirely silent on the subject.

I find great contrariety in the decisions of the Courts, as to the extent of the powers of inferior tribunals in regard to this matter.

In 2 *Salk.* 650—*Viner's Abridgment*, title *Trial*, and in 6th *Bacon's Abridgment*, same Title, 658, and in other English authorities, I find the position laid down without qualification, that a new trial cannot be granted by inferior Courts.

In *Tidd's Practice*, vol. 2, 810, and 1st vol. *ib.* 478, it is said that verdict may be set aside, and new trial granted, for irregularity, but not on the merits.

In 1st *Burr.* 568, (*Rex vs. Peters*) it may be deduced from the opinion of the Justices, that a new trial may be granted by inferior Courts, not only for irregularity, but for surprise; and in *Doug.* 354, such seems to be the admitted doctrine.

In 1st *Johnson's Cases*, 179, 181, 241, it is decided, that the Sessions Court of New-York, being an inferior Court, cannot grant a new trial on the merits. See also *New-York Cases in Error*, 319, and 2 *Johnson's Reports*, 371, where the same principle is recognised.

The reason on which the doctrine rests, as may be gleaned from those authorities, seems to be, that there is an ample redress provided for this matter, by virtue of the controlling powers inherent in the superior tribunals. If the verdict be against evidence, &c. the whole case may be taken up to the superior tribunals, and a trial *de novo*, be there had. It must be observed, that in this case, there is no such mode of redress; for the only effect, of the mode appointed to take the cause into the superior tribunal, that is by *certiorari*, is to correct errors of law apparent on the record. In this view of the matter it would seem that there is danger of a failure of justice, unless a new trial can be granted, especially in cases of surprise. I am inclined to think, that the same reasoning which induced a departure from the doctrine

as once held, that no new trial could be granted after a trial at bar, would warrant the allowance of new trials in special, or inferior Courts, wherever, as in the case before us, there is no means by *certiorari*, or otherwise, to redress the grievance.* But, we decline any positive expression of opinion upon this point, as it is not necessary to a decision of the case that we should do so. For, even if it be allowable to grant new trials in this proceeding, it was, we are satisfied, erroneous to have set aside the first verdict and judgment, and to have proceeded, after the manner disclosed in the record, to a second. Nor are we to be understood as receding in this decision, from the extent to which we have heretofore gone, in refusing to review the exercise of the discretionary power of inferior courts, on the subject of new trials. A distinction necessary to be observed, obtains in this matter, which is, that though the merits, or grounds of an application, (as, for example, the sufficiency of the affidavit of surprise,) will not be examined into, yet the competency of the Court to grant it, (as where it should be granted after two new trials already had) is a proper subject of revision. The error committed in this case, is of the latter kind; and consists not merely in the granting of the new trial, but also in the failure to notify the plaintiff in error of the time at which such new trial would be had; of which, in a case like this, it would be absurd to say, that in legal contemplation he is to be held cognizant, as it was evidently arbitrary with the Justice.

*2Tidd's P.536

It is a settled doctrine on this subject, that no new trial can be allowed after the rendition of final judgment in the cause. According to our practice, the term of the Court is the limit within which, such

discretionary power is to be exercised ; it being considered that the judgment is inchoative, and the record still in the control and power of the Court, until its signature by the Judge, which is the last act of the term, and the consummation of its business. Now, here, this provisional Court had terminated, or at any rate the destiny of the case was fixed beyond the control of the Justice, by the rendition of judgment, as attested by his signature, on the day before any motion was made for the new trial.

It was also erroneous to proceed to judgment in the new trial, as the Justice did, without any notice to the plaintiff in error when it would take place, or waiver of such notice by an appearance ; one, or the other of which, is as necessary to uphold the second trial, as to render the first of any binding efficacy.

In any view of the case then, there was error in the Circuit Court in affirming the judgment of the Justice, as last rendered by him ; for which the judgment of the said Circuit Court must be reversed, as also the proceedings had before the Justice, after the first judgment rendered by him.

MOORE & BAKER *versus* COKER.

Under the act of 1807, exempting freeholders from suit out of the county of their permanent residence; it is not required, that the residence and freehold should be in the same county.

The words "permanent residence" and "residence," as used in that statute, are equivalent in signification.

This action was commenced before a Justice of the Peace, and taken by *certiorari* to the Circuit Court of Shelby. The point there raised, was as to the privilege of the plaintiff in error, Moore, under the statute of 1807, exempting parties from suit, out of the county of their permanent residence. The proof was, that Moore was a *resident* citizen of St. Clair, at the time the action was commenced, and a freeholder in the county of Shelby. The Court below gave judgment for the defendant in error, to reverse which, a writ of error was taken here.

Moody for Plaintiff in error.—The point here presented is, whether the statute exempting freeholders from being sued out of the county of their residence, requires the freehold and residence to be in the same county. The language of the statute certainly does not make this requirement. It was passed during our territorial government; and its language is "freeholder of the territory"—not freeholder of the county. It requires that the freehold be in the territory, and it requires nothing more, nor do I see any good reason for doing violence to the language, to give to the statute a different meaning.

ERWIN, *contra*.—The language of the statute is vague and loose. It is therefore necessary to con-

strue it according to its reason and spirit. In protecting the freeholder, it was surely not the object of the Legislature to set a trap, to involve creditors in costs. Suppose a man living in Jackson county, where he has no freehold, owns an acre of ground somewhere in the southern part of the state; how would the creditor know that he was not liable to be sued out of the county of his residence. The law could not intend to require of the creditor more than reasonable diligence in making inquiry before he commenced his suit. It could not have been intended by the statute that the person about to bring a suit should do more than to examine the records of the county where the person to be sued might reside. If he should be found to have a freehold there, then he could not be legally sued out of the county of his residence: but if he should have no freehold there, his residence should not be regarded as permanent—and the restriction as to the county in which suit was to be brought would not apply. A freehold in another county would give no permanence to his residence, and would not come within the reason of the law. It does not appear by the bill of exceptions in this case, that the county of St. Clair was the defendant's permanent residence. One object of the statute probably was to encourage the obtaining of freeholds—permanent homes. The privilege was only intended for such as had such permanent residence.

By Mr. Justice THORNTON:

This was a suit commenced by warrant before a Justice of the Peace, in the county of Shelby, and removed by *certiorari* into the Circuit Court of that county. The amount in controversy is trivial; but the principle involved in the only assignment

of error necessary to be noticed, is important; not only from its frequent recurrence in practice, but as it bears upon the personal privileges of the citizen.

The amount in controversy being under twenty dollars, the case was, of course, determinable by the Court alone; before whom, it appears from the record, the plaintiff Moore, who was defendant in the warrant, attempted to avail himself of the privilege conferred upon freeholders by an act of 1807,¹ exempting them from suit, (except in certain actions, of which this was not one,) out of the county of their "permanent residence." The proof adduced in support of this exemption, was, "that at the commencement of the suit, he was a resident citizen of the county of St. Clair, and that he was a freeholder in the State; that freehold being in the county of Shelby."

The Court below gave judgment upon this proof against the plaintiff, Moore.

The statute, I am satisfied, does not require, that the residence and freehold, should both be in the same county; but that a freehold in any county in the State, and a permanent residence in any other county, confers the privilege of exemption from suit, (in all those actions not excepted,) unless it be brought in the county of such residence. The only ground upon which the judgment of the Court below can be sustained, is, that the proof of the plaintiff in error, Moore, being "a resident citizen of the county of St. Clair," does not come up to the meaning of the act of the Legislature, which uses the terms, "permanent residence," in the section conferring this privilege. Now, the terms, "permanent residence," and "residence," are indifferently used, as it seems to me, in this very section; as also in other acts upon the same subject matter, as equivalent in signification.

In the very section above referred to, it is further provided, that one shall not be held to bail, "if sued out of the district or county of his residence and freehold." Unless these terms are held convertible, it involves a contradiction at least, not to say an absurdity. There can be no holding to bail without suit. But he can not be sued out of the county of his permanent residence, (except in certain specified actions) of course he cannot be held to bail out of it. Then it must follow, that to be held to bail, he must be sued in the county of his permanent residence and freehold; or in other words, if permanent residence and freehold are both in one county, he can not be held to bail out of the said county. So, by the act of 1818, which is in *pari materia*, it is provided that, any person, whether freeholder or not, may be sued in any county where found, without regard to his *residence*, if oath be made that such person has gone from the county of his *residence*, for the purpose of avoiding service of process. The question as to the equivalence of these terms, is, I think, settled by the opinion of this Court, in the case of *Read vs. Coker*.* There the plea contained the averment of *residence* merely, as the proof made here, and upon demurrer, it was held good by this Court.

* Stewart, 22.

Let the case be reversed.

MARR'S EXECUTRIX *versus* SOUTHWICK, CANNON & WARREN.

Though the account of a plaintiff exhibit no charge *against* a defendant within six years, yet an item in the defendant's account, within that period, takes the case without the statute of limitations, of six years.

Where a case in Chancery can be completely decided, between parties; the circumstance that an interest exists in another person, whom the process of the Court cannot reach, will not, prevent a decree upon the merits.

A suit against the representative of an estate, for the purpose of subjecting the assets of a deceased partner, to the payment of a judgment obtained against the firm; is a new and distinct proceeding, against a new party; and all the facts must be established by testimony, in the ordinary manner.

Thus, the judgment obtained against a firm, in such case, is not proper evidence, nor can the depositions taken in the Common Law suit, be read as testimony against an executor, in a Chancery cause, to compel payment out of the estate of the firm debt.

Where a judgment, having been obtained at law in this State, against a firm; the creditor, residing abroad filed a bill in Chancery against the representative of the estate of one of the partners, to subject the assets of the estate to the payment of the judgment—held, that an admission, that one of the firm resided in New Orleans, and was solvent, was fatal to the Chancery case; for this was an admission of a complete and adequate remedy at law, which should have been pursued, before resorting to equity for relief, against the estate of the deceased partner.

Interest may be charged on an open account, when the contract stipulates for a certain period of credit; but the law does not permit rests to be made in such account every six or twelve months, re-stating the account at each time, and converting interest into principal; and no custom or agreement to that effect can alter the law.

Southwick, Cannon & Warren, merchants, of New York, brought their action against Tarrant & Marr, as partners, in the Circuit Court of Tuskaloosa county. The writ was served on Marr only. During the pendency of the trial, Marr died; and judgment was rendered against Tarrant, the surviving partner. The said Southwick, Cannon & Warren, afterwards filed their bill in Chancery in the Circuit Court of Tuskaloosa county, setting forth that Tarrant had removed beyond the jurisdiction of the Court, and out

of this State ; that he had no property here, nor had when judgment was rendered, and that he was insolvent : that Marr defended the suit at law during his life time, and employed an attorney who defended it until judgment was given : that he (Marr) left at his death a large estate and property, sufficient to pay the debt, and that he constituted Nancy Marr his executrix, who had taken upon herself, that trust ; and the bill sought a decree against said executrix for the amount of the judgment, interest and costs, to be made out of the estate in her hands.

The answer of the defendant denied any knowledge of the original claim against the testator ; did not admit its justice ; denied the liability of the estate under the judgment, and required full proof on the part of the complainants. The defendant contended that usurious interest was charged in the claim for which judgment was rendered ; and of this she claimed the advantage allowed by law. The answer also denied the insolvency of Tarrant ; relied on the statute of limitations, and set up other defences, which, in view of the points embraced in the decision, it is not deemed necessary to notice in this place.

A bill of exceptions taken in the cause shewed, among other things, that the defendant objected to the reading of the judgment at law in evidence in the Chancery suit, also to the reading of the depositions taken in the suit at law ; which objections were overruled by the Court, and the judgment and depositions admitted in evidence. The defendant objected to a decree, because the fact, whether Marr was a partner of the firm of "J. Tarrant & Co." was a fact to be tried by a jury.

The defendant applied for a continuance of the cause, to enable her to prove the solvency of Tarrant

at the time of filing the bill ; and that he resided in New Orleans, was engaged in extensive business, and enjoying good credit. These facts, the complainants, for the purpose of obtaining a trial at the time, admitted.

The Court below decreed the amount of the judgment at law, the interest thereon, and the costs of said judgment, to be paid by the defendant out of the estate of her testator.

CRABB, for Plaintiff in error.—The demurrer should have been sustained for want of proper parties defendant. The complainants lived in New-York, and Tarrant lived in Louisiana. Tarrant was as much within the reach of the complainant, as was Marr's representatives. Tarrant ought, at least, to have been made a party to the suit, because he was not only a party in interest, but was first liable.—*Gow*, 109, 110, 232—2 *Stewart*, 291—*Aikin's Dig.* 289.

The demurrer should have been sustained, because there was a want of equity in the bill. The remedy was at law. It was so, I contend, independent of the statute. But our statute renders the remedy at law more clear and unquestionable. It makes the debts of partners joint and several, allowing a remedy against either.—*Aikin's Dig.* 268. We have a statute which does away the *jus accrescendi* in cases of joint contracts. This removes the reason respecting the right of survivorship as to the remedy ; and the law with us corresponds with the reason of the case.

Chancery cannot be resorted to where the remedy is adequate at law.—1 *Stewart*, 81, 532.

Had the complainants brought their suit against us at law, we would have had an opportunity of defending ourselves before a jury of the country, where all matters of fact involved might have been properly

investigated, and where, among other things, the question, whether Marr was the partner of Tarrant, might have been tried by a jury.

The demurrer should have been sustained, because the object of the bill was not a legitimate one. It was to revive a judgment against John Tarrant, so as to make it operative against the executrix. This was not allowable. There was no privity in the case. The executrix is neither the representative of John Tarrant, nor of Tarrant & Co. A partnership is in the nature of a private corporation: Tarrant only, has any privity with the firm. There can be no revival of a judgment without such privity, and when such privity exists, the remedy is a *sci. fa.*—*Coke on Lit. A.*—6 *Bacon's Abr.*—1 *Stewart*, 194. It should have been shewn that the property of the firm had passed away entirely, before the representative of the deceased partner could be proceeded against.

The Court erred, in permitting the judgment against Tarrant, to be introduced as evidence in the Chancery cause. The parties were not the same: They were not the same in interest, nor in equity and justice. Marr may have had a defence, personal to himself. We contend he had. The admission of this evidence, was groping in the dark for the truth of the case. The point in controversy was not necessarily the same. The presumption is, that the defences set up in the answer, were never made in the Court of Common Law. The executrix contends that Marr was never a partner—that the claim is affected by usury. Were these defences made before? The judgment was no evidence of a debt against the executrix.—*Peake*, 68, 69—*Starkie*, 190, 191, 217, 221—1 *Conn. Rep.* 507—3 *ib.* 516—1 *Munf.* 373, 374, 37, 398—3 *Johnson's Reports*, 8—14 *Johnson's Reports*,

79 to 81—4 *Mass. Rep.* 613—3 *Yates' Rep.* 128—3 *Greenleaf's Rep.* 165.

It was error in the Chancellor, to permit the depositions, taken in the Common Law suit, to be read in the suit in Chancery, against the executrix. The suit was abated as to Marr. There was no judgment against him; the judgment, therefore, against Tarrant, could not be read against Marr's representative; and the depositions must follow the same rule. It is the depositions which support the judgment.

The question as to Marr's partnership should have been tried by a jury. It was a question of fact, and one on which the whole case might turn.—2 *Maddock's Ch.* 260, 474, 475, 479. If it be said that the chancellor had a discretion in this matter, I contend that it is not such a discretion, but this Court may decide, that the Court below decided erroneously.

The Court did wrong in reviving the judgment at law, instead of trying the facts anew. The decision of the Court, in the Common Law trial, was improperly taken as conclusive.

There was also error in the decree against the executrix, because Tarrant was *living and solvent*. Tarrant might have been sued in the Federal Court. The cause of action was not local: he might have been sued in the Courts of Louisiana. The case here, is altogether different from those cases to which the English doctrine applies, of a party being beyond the four seas. For the doctrine, that the complainant was bound to pursue the surviving partner, he being solvent—see 4 *Day*, 481—1 *Gallison's Rep.* 371, 2 *Mass.* 572.

The decree is also erroneous, for usury. The authorities are against allowing legal simple interest on an account of this kind. But here, by six months

rests, the interest was converted into principal, and interest thus allowed upon interest. This is clearly usury.

PECK, *contra*.—The remedy against the estate of a deceased partner, where the debt can not be collected out of the surviving partner, is clearly in Chancery.—*Kirby's Rep.* 147—2 *Johns. C. R.* 508. It is because the surviving partner is supposed to have in possession the effects of the firm, that the remedy is first against the survivor. Then when all due diligence has been used against the survivor, without the creditor being able to recover, the remedy against the representative of the deceased partner becomes complete. And this remedy can only be pursued in equity.

It is urged in argument, that in our State, we have a remedy at law: that our law makes the debts of partners joint and several. If this were true, it would overthrow one of the strongest objections that the defendant below makes, namely, that we did not sufficiently pursue the debt against Tarrant. Such, however, is not the law; and if it were, it would work great injury. The doctrine is fully settled in this Court, that the only remedy in the first instance, is against the survivor.—*Gow on Part.* 460—1 *Gallison*, 630. But, before the remedy in Chancery could be taken away, such would have to be the express language of the statute. A new legal remedy would not take it away. The old remedy is not to be considered as removed, where both may stand together.

After it had been urged, that our remedy was at law, because our statute had made all such debts joint and several, it is strangely contended, that we were

bound to pursue Tarrant further than we did. If the debt and the remedy had been several, as contended for, we were not bound to pursue Tarrant at all. But without insisting on this, if the survivor be either insolvent, or beyond the jurisdiction of the Court, it is sufficient, to give us our remedy in equity. If both partners were living, the whole debt might be collected from Marr, a bill being filed stating that the other partner lived beyond the jurisdiction of the Court. Tarrants' being out of the state, is sufficient ground for us to proceed in equity against Marr's representative. The State of Louisiana is a foreign State, as to the jurisdiction of our Court. If we could not proceed against Marr's estate, on account of Tarrant being in Louisiana, then if he were to go to England or to France, the case would be the same. Would the Court send a creditor to England, to bring his suit in the Court of King's Bench, when a party, bound in equity for the payment of the debt, was here.—1 *Vesey, jr.* 416—2 *Atkins*, 510. We pursued our remedy against the surviving partner, as far as the Courts could reach. We obtained a judgment, had an execution issued, and it was returned *nulla bona*.

It is objected that Tarrant should be joined in the bill. The objection is untenable. To have joined him in the bill would have been a misjoinder of parties. In such case, the decree would have been against Tarrant in his own right, and against the executrix, in her character as such. The decree must have been against both for the whole amount; but, in different rights. This would have been a fatal objection to the decree.

As to the introduction of the Common Law judgment in evidence, it is admitted, that, in general, a

judgment against a different party cannot be received ; but this stands on different ground : the judgment was properly against the firm.—1 *Starkie's Ev.* 181—2 *Stewart*, 386—1 *Espinas*. 607. The suit was commenced against Tarrant and Marr, and the judgment rendered against Tarrant, as survivor of the firm. In such a case, I doubt whether the judgment should not be taken as conclusive evidence of the indebtedness, and of the amount of it. The same matter was in issue ; the debt was the same—the plaintiffs were the same, and the defendant was the executrix of one of the same defendants. Is not this a stronger case than that in *Starkie*, where the judgment against the sheriff was made conclusive evidence against the securities ? But, be this as it may ; the judgment was, at least, admissible evidence to shew that complainants had prosecuted their suit at law as far as due diligence required ; and also to authorise the admissions of the depositions, and to shew that Marr had an opportunity of cross-examining. The introduction of the judgment and of the proceedings in the Common Law suit, was certainly proper in the suit in Chancery. They had been exhibited in the bill, and admitted in the answer. The judgment was, I conceive, a judgment against the firm, and therefore binding ; but the chancellor does not seem to have given that extent to the effect of the judgment. As to the doctrine concerning parties and privies, I contend that Marr was, in effect, a party. He was a party to the suit, and although he died before judgment, the suit was defended by the survivor, and the judgment therefore, as I think, settled the amount of the indebtedness of the firm, of which the executrix' testator was a member.

The depositions taken in the Common Law suit,

were proper evidence. Depositions properly taken in one proceeding, may always be read in another between the same parties, or those claiming under them. There could be no necessity of taking these depositions over again. They had once been regularly taken (the witnesses residing in New-York) and the executrix' testator had a full opportunity of cross examining.—1 *Har. Ch. P.* 299 ; 2 *Maddock C. Pl.* 443 ; *Viner's Ab. 2d v. A.* 553 ; 2 *Vern. Rep.* 443 ; 1 *Vern. Rep.* 413 ; 3 *Johnson's Ch. Cases*, 374 ; *Star-kié's Evidence*, 272, 273.

It is urged that the bill should have been adjudged bad on demurrer, because it prays for a *revival* of the judgment at law. If the prayer be inappropriate, that is no cause of demurrer. If the bill be judged bad, it must be on account of its allegations. But I do not perceive the inaptitude of the prayer. The revival for which it prays is not to be taken in the technical sense, which must be by *sci. fa.*

It cannot be error that the Court did not submit the question to a jury whether Marr was a copartner or not. Such submissions of matters of fact are within the discretion of Courts of Chancery, and the exercise of discretion is not a ground of error.

I contend that nothing like usury is established in this transaction. The goods were purchased on a stated credit of six months. At the end of that time the debt bore interest ; and in the payments made from year to year, the interest was first deducted ; but after the closing of the account, rests were no longer made, nor interest charged, except on the principal debt.

WILSON, in reply.—It is contended on our part, that the remedy was at law. According to the Eng-

lish common law, partnership contracts were joint, and one partner being alive, law would not permit a suit to be prosecuted against the estate of the other. Resort must be had to chancery for that peculiar reason. This was not general but special chancery jurisdiction, and when this reason comes to cease, as it does by our statute, which has made partnership contracts several as well as joint, then resort cannot be had to Chancery. When the suit was brought against Tarrant & Co. Tarrant, who was the active partner, lived in New Orleans. The suit might have been brought against Tarrant in the State of his residence; or it might have been brought here against Marr alone, in this last case, the death of Marr would only have produced a few months delay. The delay that is complained of was occasioned by the course which the complainants chose to pursue. If the complainants had sued Marr alone, they would have had a complete remedy at law. So, though more tedious, his remedy was complete at law, by taking a judgment against Tarrant; but he was bound to pursue that judgment, and to collect it of Tarrant. Or if they were not bound to pursue Tarrant, why might they not have prosecuted a suit at Common Law against the executrix—partnership contracts being, in this State, several as well as joint. In any point of view, there seems to have been no pretence for going into Chancery.

Tarrant should have been made a party. All having an interest in the judgment or decree should be made parties. Tarrant was primarily liable. He has the funds of the firm in his hands. Why should the executrix, who is a stranger to the transaction, be pursued alone in a Chancery suit. She, at least, was entitled to the aid of Tarrant's knowledge of the

matters in contest. That the decree would have been against Tarrant and the executrix, in different rights, is no objection in Chancery: the Chancellor can make the proper decree against each party.

The States of the Union are not foreign to each other, like France, England, and the East Indies. Though fond of the doctrine of state sovereignty, I have never carried it that far. The people of the States form one people for many purposes. The Federal Courts were open to the complainants. The complainants' living not in this State, but in New York, were not privileged suitors. If I am right as to the severalty of the claim, then the complainants' remedy at law was complete against the executrix; if I am not right in this, then the complainants were bound to pursue the surviving partner, who was as accessible to them as the executrix, neither residing in the same state with the complainants.

The bill does seek to revise the judgment at law. The complainants do not go on the original consideration. This is not allowable. The Chancellor can, it is true, grant relief under the general prayer, but not contrary to the tenor and main scope of the bill. This was a bill for a revival, and therefore not to be supported in such a case.

The opposing counsel represents the judgment at law as not being offered or used as the foundation of the decree. How so: the judgment is made part of the decree, the costs are embraced in the decree. Look at the language of the bill and of the decree also! Would equity have allowed the compound interest, if the judgment had not been regarded as conclusive? The interest is added to the principal, even where there were no payments, at the end of each year, and interest charged on interest, for five

years! If that be not compound interest, I know not what it is.

The executrix was neither party nor privy to the Common Law suit. She was neither the representative of Tarrant, nor of the firm. The judgment then, and the depositions were improperly used as evidence, to prove the indebtedness of her testator. It does not appear that the depositions were read in the Common Law cause; and if they were, still, if Marr had lived, he might have excluded them.

The decree is certainly erroneous. Tarrant's acknowledged solvency would of itself be fatal to a recovery against the executrix of the deceased partner.

By Mr. Justice HITCHCOCK:

In this case the bill was filed in the Circuit Court of Tuskaloosa county, by the defendants as complainants. The bill states that the complainants are merchants and partners, doing business in New-York. In 1824, one John Tarrant and one William M. Marr, since deceased, purchased goods of complainants, and continued to do so until 1830, making occasional payments; that in June, 1830, a balance was struck, and the defendants were indebted to complainants for principal and interest, one thousand six hundred and three dollars and eighty six cents: that a statement of the final account was made and forwarded to the defendants, which they neglected to discharge: that a suit in assumpsit was instituted by complainants against defendants in the Circuit Court of Tuskaloosa county, on the thirty-first of January, 1831, returnable to the next March term. The writ was served on Marr only. At September term, 1831, the death of Marr was suggested, and the cause ordered to proceed against Tarrant, the surviving partner:

that at the April term, 1832, a verdict and judgment were rendered against Tarrant, for one thousand eight hundred and one dollars and eighty four cents, and one hundred and twenty one dollars and ninety five cents costs: that execution was issued on the judgment, and returned "no property:" (the record of which suit is exhibited:) that Tarrant did and does reside beyond the limits of the State, and has no property here, nor had when judgment was rendered, and was, and is reputed insolvent, and is insolvent: that Marr died in August, 1831, and until his death defended the suit, and employed an attorney, who defended the same until judgment: that Marr left a large estate, and personal property, sufficient to pay the judgment: that Marr made a will, nominating the defendant as his executrix, who accepted the trust: that the will directs all Marr's just debts to be paid, and contains an admission of Marr's partnership with Tarrant: that the judgment against Tarrant is an equitable demand against the estate of Marr: that the defendant refuses to pay it, and pretends that Marr and Tarrant were never partners, and never purchased goods of the complainants—the contrary whereof is true; and that equity has jurisdiction of the case.

The bill prays, that the defendant, executrix, be made a party, and that she may answer: that the defendant, as executrix, be decreed to pay the full amount of the judgment, and costs of suit, and interest thereon; and also prays for general relief.

The defendant, in her answer, states—that she knows nothing of complainants account, except that she heard her deceased husband say it was unjust, and that he would not pay it. The institution of the suit; and proceedings to judgment are admitted.

The defendant insists, that the judgment cannot form a ground of recovery against her, being *ex parte*, and not obligatory; and requires that her liability be established, by witnesses which she may cross-examine; and adduce rebutting testimony: that the mode of calculating interest, as appears from the exhibits, renders the judgment usurious and void; she claims advantage of this: that one thousand four hundred and seventy one dollars worth of goods were purchased by Tarrant, individually, for which she is not liable: that the credits on the account should be confined to a period subsequent to the first purchase by Tarrant: and that the judgment as against her, for these reasons, is void.

The answer admits the will, and refers to it for all defendant's information respecting the co-partnership: the defendant did not pay the judgment, because her husband said the claim was unjust: that the defendant is informed by Tarrant, that the firm of J. Tarrant & Co. was composed of one James Pitcher, Samuel Pitcher, the said Tarrant and her husband: that the articles of copartnership were made a considerable time after the account, and were *anti dated* by James Pitcher, with a fraudulent intent to charge her husband with the purchase of goods, which was made by James Pitcher: that the suit should have been commenced against Samuel Pitcher, who died since her husband. The answer admits, that John Tarrant resides in New Orleans, and so resided before the institution of the suit at law, within the knowledge of complainants, and states a belief of his solvency; and that Tarrant says, he is able to pay all just demands. The answer also submits that Marr may have defended the suit until his death, and his counsel continued in the defence until judgment, yet this does not authorise a recovery on that judgment, as it

was *ex parte* : that she does not know when Samuel Pitcher died : that Marr had considerable property—enough to pay his just debts : that the estate is yet unsettled : that the defendant does not wish to incur individual responsibility : pleads the statute of limitations : (that 1826 is the last item in the account—1828 the last credit thereon:) defendant is ignorant of partnership transactions, Tarrant being the acting partner. The defendant demurs to the bill, insists that judgment against one partner cannot be revived against the representatives of a deceased partner, without proving the original consideration : that the remedy is at law, and complainants entitled to none of the relief sought for.

The Chancellor decreed the amount of the judgment at law, (\$1811 84,) interest thereon, (\$284 93) and the balance of the costs of the judgment at law, (\$56 55 1-2) to be paid by the defendant out of the estate of her testator.

A bill of exceptions, of the substance following, was taken to the opinion of the Chancellor.

1st. The defendant objected to the introduction of the judgment at law, stated in the bill, on the grounds,—that her testator was no party to that judgment; had no opportunity of making a defence against it; could not have the benefit of witnesses; could not sue out a writ of error; could not appeal therefrom, though erroneous; could not challenge the jury : if judgment had been different, could not have taken advantage of it in another suit, on the same cause of action; and because the surviving partner, Tarrant, could not compromit the rights of her deceased husband, by suffering judgment to be rendered against him. These objections were overruled,

and the judgment received as evidence before the Chancellor.

2d. The defendant objected to admitting the evidence, as exhibited in the bill, on the ground, that it did not appear that the said evidence was taken regularly and before competent authority.

3d. The defendant objected to the introduction of the depositions in the suit at law, because it was not stated in the bill that they were read on the trial at law ; because proper steps had not been taken to make them evidence, the defendant never having been notified that they would be relied on or offered on the hearing—no previous order to admit them having been made, and no sufficient reason stated or proved why they could not be re-taken ; and because the depositions contain answers, and state facts, not evidence in the present suit—because they were taken to establish a fact which the judgment at law could not—the partnership of Marr and Tarrant. These objections were overruled, and the depositions received as evidence. The defendant also objected to a decree, because the fact, whether Marr was a partner of the firm of J. Tarrant & Co. was an issue, to be tried by a jury.

At the hearing of the cause below, before the Chancellor, the defendant applied for a continuance, to enable her to prove the solvency of Tarrant at the time of the filing of the bill ; that he was then solvent ; and that he was, and is, engaged in New Orleans, in extensive merchandizing, and enjoying good credit. Upon this, the complainants, for the purpose of obtaining a trial at that term, admitted the residence and solvency of Tarrant, as stated in the affidavit for continuance.

The errors assigned, are,

I. The Chancellor erred in not sustaining the plea of the statute of limitations, relied on in the answer.

II. There was error in not sustaining the demurrer to the bill. 1st. For want of proper parties defendants. 2d. The complainants' remedy was at law. 3d. The complainants were not entitled to the relief sought for; nor the revival of the judgment at law against the estate of defendant's testator.

III. There was error in admitting the judgment at law, referred to in the bill of complainants, &c. as evidence, and in not excluding the same on the ground, &c. stated in bill of exceptions.

IV. The Chancellor erred in admitting the depositions of the witnesses as exhibited in the bill of complainants as evidence, on the hearing, for reasons stated in the bill of exceptions.

V. There was error in overruling the objections of the defendant below, to the introduction of the depositions of the witnesses taken in the suit at law, and in receiving the same on the hearing.

VI. There was error in overruling the objections of the defendant below to the rendering of a decree before the issue tendered in the answer was tried by a jury.

VII. There was error in rendering a decree against defendant.

VIII. The decree should not have revived the judgment at law, against the estate of defendant's testator. 1st. The decree should have been rendered, if at all, on the original consideration of the judgment, proved by competent testimony. 2d. The costs of the suit at law, should not have been decreed against defendant below. 3d. The decree should not have been rendered against defendant below, because the proofs in the cause show, that Tarrant was sol-

vent, and that fact, together with his place of *residence*, was known to the complainants below; the complainants also, not being citizens of the State of Alabama; and the subject matter of the bill, in its nature, not confined to the jurisdiction of the Courts of this State.

IX. The decree should not have been rendered for the amount of the judgment at law, because usurious sums of money are charged and allowed in the judgment for giving day of payment for advances made.

The several questions which are presented by the assignments of error in this case, have been ably and elaborately argued by the counsel on both sides, and they will be examined in the order in which they have been presented, so far as they are deemed material to the determination of the case.

I. The first enquiry presented is, as to the reliance on the statute of limitations.

By looking into the account, as exhibited in the depositions used on the trial at law, between the present defendants and Tarrant, it appears that the account commenced on the 20th November, 1824, and is continued down by various charges, from time to time, till the first of May, 1826. The account purports to have been balanced on the 11th September, 1826, by the complainants, when there was two thousand three hundred and seventy eight dollars and forty-eight cents, due. On the credit side of the account, it appears that J. Tarrant & Co. are allowed for sundry payments, commencing on the 3d April, 1826, and terminating on the 19th September, 1827, when there was a payment of twelve hundred and nine dollars and sixty three cents, leaving a balance due the complainants on that day of one thousand two hundred

and forty one dollars and seventy seven cents. This bill was filed on the twelfth February eighteen hundred and thirty-three, more than six years from the date of the last debit, but less than six years from the date of the last credit. This state of facts will render it entirely unnecessary to examine the various points which have been made upon the statute of limitations: for the law is well settled "that if there be an item in the defendant's account within six years, this will take the account of the plaintiff out of the statute, though the plaintiff's account contain no item within that period." Whether, therefore, this is to be taken as an account current, the last item of which is dated 19th September, 1827, or as an account stated and acknowledged, as is contended to have been proved by the deposition of James Pitcher, and which would bring the account down to a still later period, upon which we give no opinion, it is very clear that the statute does not, in this case, interpose a good defence.

*Angell Lim.
193, and the
authorities cited.

The account is admitted to be between merchant and merchant, and therefore, we do not conceive that the statute which bars open accounts, at the expiration of three years, can, under any circumstances, apply. The reservation in the statute, excepting such accounts as concern the trade of merchandize between merchant and merchant, from its operation, relates exclusively to that, which fixes the limitation at the expiration of six years.

How far the questions, whether there is any bar to accounts current between merchant and merchant, and if so, whether the death of Marr, and the delay which has necessarily intervened in prosecuting Tarrant to judgment, would protect the complainants, we do not

find it necessary to decide, in the view which we take of the case.

II. The second assignment raises a question of the sufficiency of the bill, on the demurrer. To sustain the demurrer, the plaintiff in error, contends—

1. That the bill is defective for want of parties—Tarrant not being made a co-defendant; and,

2. That the complainants have a complete remedy at law, under the act of our Legislature, which enacts, that whenever any cause of action may exist against two or more partners of any denomination whatever, it shall be lawful to prosecute an action against any one or more of them.*

*Aik. Dig. 269

*19 Wheat. 197
10 ib. 167.

1. That all persons in interest to a bill in Chancery should be made parties, is, as a general rule, undoubtedly correct. Exceptions are, however, allowed to this rule, when, from the nature of the case, it is not required; or, from the situation of the party, it is difficult or impossible to reach him,^b and also, when the residence of the party in another State is stated as a proper ground of omission. The principle appears to be, that when the case can be completely decided between the litigant parties, the circumstance, that an interest exists in another person, whom the process of the Court cannot reach, ought not to prevent a decree upon the merits.

In this case, the object of the bill is to obtain satisfaction of the entire demand of the complainants, out of the personal estate of the defendant's testator. The surviving partner, Tarrant, is alleged to be beyond the jurisdiction of the Court, and to be insolvent. Admitting this to be true, as the demurrer does, there is no absolute necessity for his being a party; and the bill ought not to be dismissed on that ground.

2. Neither does the Court think that the second ground is sufficient to sustain the demurrer.

By the Common Law, the debts of partners are joint; and by the death of one they become extinguished as to his testator or intestate, and can only be revived in equity.) During the existence of the partnership, the partners must be sued jointly, and we do not think that our statute, which authorises one or more to be sued separately, has subverted the whole doctrine of joint liability and survivorship, (which it must do, upon the principles contended for by the defendant) and placed partners and their executors and administrators upon the footing of joint and several obligors or promissors. The statute has not expressly declared it, and we are not prepared to do so by construction. This, the Legislature has done in the case of joint obligors, and has expressly authorised suits against any one of them, or his administrator or executor. But to give this statute that construction, would have the effect of subjecting the assets of deceased partners to the payment of the partnership debts, while the surviving partner would have the exclusive control of all the partnership funds, out of which the partnership debts ought, in justice to be paid. Where a suit has actually been commenced against a partner under the statute, and he dies pending the suit, it may be, that the suit could be revived and prosecuted against his executor or administrator: the Court are inclined to that opinion. Having asserted his right under the statute, the creditor ought not to be deprived of his remedy under it by any act not within his control: farther than this a majority of the Court would not go, in the construction of this statute; and they do not intend to commit themselves upon this point, as it is not now necessary to be decided.

The III, IV, and V assignments, relating to the admissibility of the judgment, the testimony exhibited with the bill, and the depositions taken in the suit against Tarrant, will be examined together.

1. As to the judgment.

That a judgment of a Court of concurrent jurisdiction, directly upon the point in controversy between the same parties, as a plea in bar, and as evidence, upon the same matter directly in question in another Court, is good, is undoubtedly true; and that it is not evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter to be inferred by argument from the judgment, is equally true; and no one can be bound by a verdict or judgment, unless he be a party or privy, or possess the power to make himself a party. For otherwise he has no power of cross-examining the witnesses, or of adducing evidence in furtherance of his rights: he can have no attain, nor challenge the inquest, or appeal, or writ of error. In short, he is deprived of the means provided by law for ascertaining the truth, and consequently it would be repugnant to the first principles of justice that he should be bound by the result of an inquiry, to which he was altogether a stranger.^b

^a1 Starkie 217.

In this case, the judgment was used and taken as the basis of the decree, and yet the defendant in this bill was neither a party or privy to the suit at law, and had no power to make herself a party.

2. And this rule is equally applicable to the exhibits and depositions. The *party* to be affected by them must have been legally called upon to cross-examine the witnesses, and have had the opportunity to do so, for otherwise the great and ordinary tests of truth are wanting, and this cannot be done unless he

MARR, EX'IX, vs. SOUTHWICK, CANNON & WARREN.

be a party ;* and hence it is a rule, that when a judgment is not evidence against a party, the depositions taken in the case cannot be.^b

*1 Starkie, 264

^b1 Starkie, 267

But it is contended that as Marr was a defendant to the suit at law until his death, and had notice in his life-time of the time and place of taking the depositions, and did in one case actually file cross interrogatories, his representative ought to be bound by them, though he died before they were used, or the judgment obtained. By the death of Marr the whole proceedings were abated as to him ; and so far as his representative is concerned, they are to be considered as never having had any existence. Had Marr lived and defended the suit, he might perhaps have defeated those depositions in various ways. They might not have been properly taken, or properly opened, the witnesses might have been interested, or their testimony been irrelevant or contradicted, or they might never have been read. By his death he was deprived of all these defences, and his representative has not had any opportunity to subject them to any of these tests. It is therefore clear, in the opinion of the Court, that in this branch of the case, there is manifest error. The suit in Chancery to subject the assets of a deceased partner, is a new and distinct proceeding against a new party, and all the facts must be established by testimony in the ordinary manner.

VI. The sixth assignment, that the Chancellor should have directed an issue to try the fact of Marr's being a partner, is not supported by authority. A Chancellor may, in his discretion direct an issue, but he is not bound to do so, except in some cases required by statute, or in a few specified cases, of which this is not one.^c

^c2 Mad. 474.

VII—VIII. The 3d specification of the 7th and

8th assignments, presents a question of more difficulty than any one disclosed in the record, and one upon which the Court has been less aided by authority. The admission by the complainants, that Tarrant was at the time of the filing of the bill, and at the time of the trial residing in the city of New Orleans, and that he was and still is solvent, and in good credit, places the case upon an entirely different footing from that set out in the bill.

That the complainants have obtained a judgment against him in conformity with the laws of this state; that the execution has been returned *nulla bona*; that it is admitted there are no effects of the firm within this State, upon which the judgment can be levied; and that the surviving partner has removed himself and his effects beyond the jurisdiction of our Courts, presents a strong case for the assertion of the complainants' claim against the assets of the deceased partner, which are admitted to be sufficient to pay this and all his other debts, cannot be denied. Yet there is no principle which appears to be better established, than that in order to maintain the jurisdiction of a Court of Equity, there should be an absolute discharge or insolvency of the surviving partner. "If he is liable at law and is able to pay, the bill cannot be sustained."

1 Gallison 385

It is asserted, by Mr. Justice *Story*,* that "it is perfectly well settled that equity will not lend its aid to reach assets in the hands of executors, when a complete, adequate and effectual remedy at law exists against the surviving partner." Such also is the authority of Chancellor *Kent*," after a minute examination of all the English authorities upon the subject.

2 Johns. Ch.
R. 508.

At law the debt is extinguished as to the deceased partner, and the creditor is not bound to use any dili-

gence (such as would be required in case of an endorsed note.) He may deal with the survivor for a time, and let the debt of the firm remain unpaid, and yet in case of subsequent insolvency may resort to the deceased partner's estate. Mer. R. 547

That great inconvenience may often arise by the removal of surviving partners, is no doubt true; but still the rule must not be impugned, to remedy the inconvenience. In this case, the removal of Tarrant may create delay; but still it cannot be said the complainants are without a *complete, adequate, and effectual remedy*, at law.

The city of New Orleans is a prominent city of this Union: her commercial intercourse with New York, where the compl'ts reside, is as great and intimate, as with us. The Courts of Louisiana, and that of the United States, in that State, are open to the compl'ts, and in point of fact, they might as well have gone there, in the first instance, as to have come here; and they can go there now. There is nothing local in the contract. Tarrant has not obtained a legal discharge from the debt, and he is solvent, by the admission of the complainants. Equity says, they must therefore pursue the remedy there; yet, they may ultimately resort to the estate of Marr, and recover the debt here.

A case might be imagined, in which the absence of a surviving partner, though no legal discharge or insolvency was proved, would present a case for relief in equity: but as the case now stands, the Court are constrained to decide, that the admission of the solvency of Tarrant, is fatal to the bill.

IX. There is also error in the mode of computing interest, as set forth in the 9th assignment. The law does not allow rests, or the computation of inter-

*1 Johns. Ch.
R. 13.

est upon interest, by re-stating the account every six or twelve months, and adding interest to the principal sum : and no custom or agreement to that effect, can alter the law. Interest may be charged on an open account, when by the terms of the sale, the contract stipulates for a certain period of credit: but the mode of computation is to charge interest on the debt up to the date of the payment, and deduct the payment from the whole debt; and so, as often as payments are made. This is the rule in Chancery in New York, where this contract was made, and where it was to be executed.*

From this view of the case, it follows, that the decree of the Chancellor below must be reversed, and the bill dismissed.

RANDOLPH *versus* PERRY.

Where there is a subsisting contract in writing, between parties, adequate to determine their rights, and under which work has been completed, it will not be permitted for one of those parties, to set up a new parol agreement, without consideration, varying the first, and changing its terms and conditions.

The statute of 1807, restricting the charge for attendance, in any bill of costs, of more than two witnesses to any one fact, must be understood, to mean such facts as are material, and which may necessarily arise in the progress of a cause, either incidentally, collaterally, or directly upon the issue, and it seems, not to have been the intention, to disallow the attendance of witnesses to the successful party, where, from the course of the adversary, or the decision of the Court, the evidence of such witnesses (otherwise proper) has been superseded, or dispensed with.

Assumpsit in the Circuit Court of Greene. The plaintiff below, Perry, declared for work and labor done and performed at the instance and request of

defendant, and there was a verdict for the plaintiff. On the trial, a written agreement for the performance of work at specified prices, was given in evidence, as also a memorandum signed by the parties, explaining some intended alterations in the plan of the work, and particularly referring to the first contract. •

The Court then permitted the plaintiff to show by parol testimony, that the work had been performed in a mode superior to that stipulated in the agreement, and that the defendant had consented to abandon the prices therein specified, and to resort to other charges differing from those first agreed upon.

The defendant, subsequent to verdict, required the Court, to instruct the clerk to exclude from the bill of costs, the taxation of charges for attendance of sundry of plaintiff's witnesses, on the ground, that all the witnesses subpoenaed and in attendance, had not been examined on the trial; which the Court refused.

On these points, by bill of exceptions, the case came into this Court.

STEWART, for Plaintiff in error.—Here the written agreement is proposed to be varied by proof from which a different understanding might be inferred. It does not seem to have been proof of another contract, but proof from which a different contract may have been inferred. At most, a contract cannot be done away but by a contract. The introduction of such loose verbal evidence, to vary a written agreement, as was here proposed, cannot be admitted. Besides, as to the second agreement, if any such existed, it was *nudum pactum*; there was no consideration to support it.

A consideration is indeed attempted to be established. There was on the part of Perry an offer to prove that some of the work was done in a superior style; but this at most could only be in the nature of a *past* consideration; and to make such a consideration binding, it must be done at the request of the party benefitted.—1 *Sand. Pl. & Ev.* 171, 172, 173—*Comyn Con.* 27, 291—2 *Marsh.* 57. Here there was no proof that Randolph requested that the work should be done in a different style from that first agreed upon.

We also contend that the Court erred in the taxation of costs. There were sixteen witnesses summoned by the plaintiff, and only four of them examined. We moved the Court to include only the witnesses who were examined; which the Court refused. This, we contend, was error.

ERWIN, *contra*.—It is said that defendant was benefitted by the verbal agreement. So far as the facts appear, it was not so. The amount he recovered was less than the amount he was to receive by the original agreement. The party who has to pay “less,” cannot complain; and the facts show that the plaintiff in error did not have to pay “more.”

As to the consideration, the law will lay hold of the slightest circumstances to uphold a contract. A benefit received, or an injury or inconvenience avoided will be sufficient. So will an inconvenience to which the other party is subjected, or the preventing of litigation. A mere moral obligation will sustain a contract.

In the case referred to by counsel, where sailors were promised additional wages for great exertion in a storm, and it was held that the contract could not be

enforced, it was believed to be against public policy ; as it would induce sailors, in every such case, to hold back for higher wages.

A *past* consideration, accompanied by a promise morally binding, will sustain a contract ; as, where a man after he arrives at full age, promises to pay a debt contracted during his minority.

As to verbal evidence varying a written agreement, a case from *Pickering*, goes farther than this. There, the instrument was under seal : but the workman finding that he had made a losing bargain, stopped short. He was told that if he would go on, he should not suffer, but have a reasonable compensation. The workman recovered in *assumpsit*, although the instrument under seal was produced ; and it was contended, that the sealed instrument could not be varied by parol, and that there was a want of consideration. These objections were overruled.—9 *Pickering*, 298 to 305. This case overrules several of the cases relied upon, on the other side.

But this was not such a distinct agreement as to require a distinct consideration ; it was an assent that the established prices should govern as to the amount to be paid. May not parties adjust their own differences ? If they had been about to go to law, might they not agree not to do so, but to settle by the town prices ? And if they did so settle, would not such settlement be binding ? Say it was a distinct contract, and still the consideration was sufficient ; for litigation was thereby avoided.

As to the costs on account of the number of witnesses, the objection cannot be sustained. The statute only provides, that not more than two witnesses shall be taxed to prove the same fact. To apply this rule, the attention of the Judge must be called to the

facts proved by the different witnesses : but this was not done here ; nor could it be, for the witnesses were not examined. It is often uncertain what course a trial will take, A trial on the merits may be expected, for which purpose it may be necessary to have many witnesses in attendance ; but it may go off on demurrer or by plea in abatement. In such cases, the witnesses are not examined, yet the party is surely entitled to his costs. Of witnesses not examined, the Court cannot decide that more than two were summoned to prove one fact.—1 *Munf.* 268:

By Mr. Chief Justice SAFFOLD:

The action was *assumpsit*,—brought in Greens Circuit Court, by Perry, against the plaintiff in error, to recover an account for carpenters work.

There were various counts in the declaration, and the general issue was pleaded. A bill of exceptions shews, that the plaintiff below gave in evidence a written agreement, dated Greensboro', July 31, 1828, specifying the items of work to be done, size of the house, &c. ; and by which Perry was bound to complete the work on or before the first of January next thereafter ; and Randolph to pay him at the same time the sum of nine hundred dollars. This agreement was signed by both the parties, and to it was appended the following—"Any alteration in this building, either in diminishing the amount of the work, or measuring the same, subject to reduction or addition, according to the usual charges of mechanics."

After which, the defendant gave in evidence the following written agreement : "Greensborough, August 23, 1828—Whereas, since the agreement between Rolls Perry and R. C. Randolph, for the

wood work of a brick building, dated July 31, 1828, said Randolph has signified his intention to alter the plan of the house; it is therefore agreed by said parties, that there shall be a reduction in the contract for any work not required in the actual plan of the building, or there shall be an addition for work over and above the contract of 31st of July, which said reduction or allowance to be governed by the rates exhibited in said first mentioned contract." This was also signed by both the parties.

Randolph introduced, as further evidence on his part, Perry's receipt for six hundred and sixty eight dollars and fifteen cents, expressed to be paid upon the "within account." On the opposite side of the same paper, was an account stated in Randolph's hand writing, containing various items of work, with prices set opposite each, amounting to seven hundred and thirty eight dollars and seventy five cents.

The record further states, that then the counsel for Perry, introduced evidence to prove, that a portion of the work was done in a manner superior to what was required by the *plan* of the house, and also other verbal evidence from which the jury might draw the conclusion, that *after the execution of the contract*, and the actual *completion of the house*, the plaintiff and defendant had agreed to abandon the contract in writing, and to be governed in their settlement by the "Tuskaloosa bill of prices," without proof of any new consideration arising between the parties, or any request on the part of the defendant, that the contract in writing should be abandoned. This evidence, being objected to by the counsel for Randolph, was admitted by the Court.

A second bill of exceptions shews, that after the rendition of judgment against the defendant below,

he moved the Court to instruct the clerk to exclude from the taxation of costs, the attendance of a portion of the plaintiff's witnesses. The facts appearing, on which the motion was founded were, that about sixteen witnesses had, at different times, been subpoenaed for the plaintiff; that of this number, seven were in actual attendance at the trial, but that four only were examined. The motion was refused, on the ground that the Court would not interfere.

The assignments of error, are,

1. That the Court admitted the evidence objected to, as stated in the first bill of exceptions.
2. That instructions, relative to the taxation of costs were refused, as stated in the second bill of exceptions.

On the first point, the enquiry arises, whether the promise was of such a nature, and founded on a sufficient consideration, to render it valid and binding? The rule of law in this respect, is said to be, that, "if there be not a strict and undoubted moral obligation, even an express promise to do that which the law did not render compulsory, will not afford a cause of action, in the absence of an adequate consideration."^a

^aChit. on Con.
12.

It will here be observed, that the question is not whether the defendant below was bound to pay for the work, a fair, and adequate price. To this extent, he was bound by the contract under which the work was done. The original agreement, which was in writing, particularly described the contemplated building, and fixed the price for the work to be done upon it at nine hundred dollars; also stipulated, that for any alteration in the plan, an addition or reduction of the price should be made, "according to the usual charges of mechanics."—

These must be assumed to have been reasonable and adequate charges, sanctioned by the custom and usage of that place—Greensborough, not Tuskaloosa.

The subsequent written agreement, contains little, if any thing more than a mere repetition of the same, that for the intended change in the plan, the reduction, or additional allowance, for such work should be governed by the rates exhibited in said first mentioned contract. Under this stipulation, the only doubt that can arise, if any, is, whether the parties intended that the reduction, or addition of price for the alteration, should be in proportion to the nine hundred dollars for the original plan, computing the amount according to that standard, or whether the *data* for this computation should be the "usual charges of mechanics."—But this question is not presented. The question is, whether the prior agreements were abandoned, and a subsequent valid contract entered into, that the entire work should be paid for according to "the Tuskaloosa bill of prices." By this we understand is meant, a general bill of rates, including the various items of mechanical work necessary in such building, and which has been adopted by the mechanics and used at Tuskaloosa.

That the parties were competent, before this work was done, to agree on the Tuskaloosa prices, or any other standard that was not so grossly unjust, as to furnish a presumption of fraud or unfairness, is not to be doubted. In that case, the work to be done would be a sufficient consideration, and the bargain would fix the price. In the case before us, the work had been *completed* under a valid contract for what we must assume to have been an adequate consideration; so it stood, binding on each party, at the time

of the supposed subsequent agreement, now insisted upon in lieu of the former. It is shewn, that the defendant below did not request the substitution of the Tuskalooosa prices, in lieu of those under which the work was done; also that no new consideration moved between the parties as the foundation of this promise. It is perfectly clear, that if the alleged subsequent agreement is void, the former remains in full force. Then what consideration is there to sustain the subsequent agreement which it was supposed the jury might infer from the evidence offered. The liability otherwise existing was adequate to the work; such at least is the legal presumption. If so, there was not even a moral obligation to pay more, or according to any different standard. It cannot be viewed as a compromise of any doubtful right; for no settlement was consummated; there was no liquidation of the demand; but the claim was left no less subject to litigation than before. We can not infer, if that could avail any thing, that an adoption of the different standard, would in any degree have facilitated the settlement. It therefore results that the promise or contract, if such was expressed, was *nudum pactum* and void;* consequently there was error in the admission of the evidence tending to prove it.

* Chit on Con.
11, 12, 13.

On the second assignment it may be remarked, that the statute of 1807 provides, that, in no bill of costs shall there be allowed the charges of attendance of more than two witnesses to any one fact. The facts here contemplated, must be understood to include all that are material, and which may necessarily arise in the progress of the trial, as well incidentally or collaterally, as those directly in issue. It can not be presumed to have been the intention of the Legislature to disallow the attendance of witnesses to

the successful party where, in consequence of the course adopted by the adverse party, or the decision of the Court, the course of the trial has been diverted from the ordinary channel, so as to exclude or supersede the necessity of evidence, which would otherwise be proper. The object seems to have been only to protect the party against an unnecessary and oppressive accumulation of costs from the attendance, or introduction of more than two witnesses to each material fact necessary to be proven. From the difficult nature of the subject, much must depend on the discretion of the Judge trying the cause. But admitting, as held by this Court, in *Smith vs. Donaldson*, that the construction of this statute is a subject of revision in error: yet the particular facts and circumstances under which the decision was made, must be more definitely shewn than has been done in this case, before we can pronounce error in the decision. The record does not ascertain the number of material facts involved in the trial; nor preclude the idea that some admission on the part of Randolph—some decision of the Court, or other circumstance, may not have obviated the necessity of proof, which otherwise would have been indispensable, on the part of the plaintiff below.

We must, therefore, say, that no error on the latter point has been sufficiently disclosed. But on the first, the judgment must be reversed, and the cause remanded.

TATE, Guardian, *versus* GILBERT.

The Supreme Court has no power to control the discretion of inferior Courts, in regulating pleadings, allowing amendments and filing additional pleas; but, this must be understood to be confined to such pleas as are consistent with each other, and with the regular order of pleading.

That an inferior Court allowed a defendant to withdraw the plea of general issue, and to substitute other pleas in bar of the action; is not error.

A plea, *puis darrein continuance*, is a waiver of all former pleas; and where three pleas were filed, the latter of which was one, *puis darrein continuance*, held, that the plaintiff was not bound to answer either, and that he properly demurred to the whole.

Tate, guardian of S. McGuire, commenced an action of assumpsit in the County Court of Shelby, against Gilbert, to recover an amount of money charged to be in his hands, as former guardian of the plaintiff's ward. At the final trial, the Court permitted the defendant to withdraw the plea of general issue, which he had previously relied on, and to file three other pleas in bar, the last of which was a plea *puis darrein continuance*. It set out, substantially, that the matter of the said suit, had been, before that time, included in a settlement which the said defendant had made with the Orphans' Court of Shelby, in a settlement of his accounts as former guardian of said S. McGuire, whereby the said Court had decreed against the defendant for a certain sum, which was alleged to be the identical amount, sued on in the said action by the plaintiff, Tate.

To these pleas there was a general demurrer, which being overruled, and the plaintiff refusing to reply, judgment was rendered for the defendant.

To reverse this judgment, a writ of error was taken by the plaintiff, to this Court.

By Mr. Justice HITCHCOCK :

This case is submitted without argument.

The action is assumpsit, brought by the plaintiff as guardian of Sally McGuire, to recover a sum of money alleged to be in the hands of the defendant, as former guardian of the same individual. The defendant pleaded the general issue. A trial, verdict and judgment were had for the plaintiff. A bill of exceptions was taken, and the cause was brought to this Court, where it was reversed and remanded, after which a second trial was had, and a verdict was rendered for the plaintiff, when a new trial was granted, and the cause was continued to August term, 1834, when the Court permitted the defendant to withdraw the plea of the general issue, and plead three pleas in bar.

1. That the plaintiff was not the guardian of Sally McGuire at the time of the commencement of his suit.

2. That the defendant was the guardian of Sally McGuire at the time of the commencement of said suit; and

3. That the Orphans' Court for Shelby county, did on the 6th day of February, 1832, settle the accounts of the defendant as guardian of Sally McGuire, and render a decree against him for two hundred and twenty one dollars sixty two and a half cents, which was for the same identical cause of action as this suit, and which decree is in full force, &c.

To these pleas, the plaintiff filed a general demurrer, which was overruled, and the plaintiff declining to reply, judgment final was rendered for the defendant, and the case has been brought here by writ of error.

It has been repeatedly decided by this Court, that

it has no power to control the discretion of the Court below, in regulating the pleadings, allowing amendments, and filing additional pleas. But this must be understood to be confined to such pleas as are consistent with each other, and with the due and regular order of pleading.

There was no error in allowing the defendant to withdraw the plea of the general issue, and file other pleas in bar of the action.

But the last of the three pleas above pleaded, is a plea of *puis darrein continuance*, which is a waiver of all former pleas. The plaintiff was not bound to reply to this and the other two, and therefore he properly demurred to the whole.

Whether the last plea is good in law as a bar to the plaintiff's action, is a question upon which we give no opinion. The case is decided solely on the ground, that the plaintiff was not bound to reply to the third plea; and as he was not bound to make a selection, he was not bound to answer either.

Let the judgment be reversed, and the cause remanded.

KENNON *versus* M'REA.

In regard to the incompetency of a witness, a distinction exists, as to an interest in the *question*, and an interest in the *event* of the suit; and a witness will not be held incompetent to testify, unless it appear, that he is to gain or lose by the *event* of the suit: and any objection as to his interest in the *question*, goes to his credibility.

As a general rule, an indorser of a note or bill, is incompetent in respect to his *interest*, as a witness in favor of a *subsequent* endorsee, to charge any party to the instrument whose liability is *anterior* to his own.

A release entered on the minutes of the Court, (not signed, sealed or delivered to the witness, and implying a mere discharge as to the *interest in the particular action*,) is not sufficient to authorize an incompetent witness to give testimony.

This was an action of Assumpsit in Tuskaloosa Circuit Court commenced by McRea against Kennon.

The plaintiff declared against the defendant, as indorser of a promissory note, drawn by one Longmire, in favor of one Shaw, and by him endorsed to the defendant.

The plaintiff was the indorsee of one Fuller; who was the indorsee of Kennon. On the trial, Fuller, the indorser of the plaintiff was introduced as a witness to prove, that the defendant had promised to pay him the amount of the note. It appeared that there had previously been entered on the minutes of the Court, a release on the part of the plaintiff, to the interest of Fuller, and the Court held him to be a competent witness, and having testified, judgment was given for the plaintiff. The defendant prosecuted his writ of error here.

WILSON, for Plaintiff in error—STEWART, *contra*.

By Mr. Chief-Justice SAFFOLD :

Assumpsit was brought by McRea as *indorsee*, against Kennon as indorser of a promissory note. The note was made by one Longmire, payable to Shaw, who indorsed it to Kennon, who endorsed it to one Ezekiel Fuller, who endorsed it to McRea, the plaintiff below.

At a term of the Court previous to that at which the final trial was had, and at which there was a *mis-trial*, an entry appears to have been made on the minutes, as follows: "Came the parties by their attorneys, and the plaintiff released, in open Court, *Ezekiel Fuller* from any responsibility or liability in this action, before he was qualified as an evidence."

On the final trial, a bill of exceptions was taken, which states that the plaintiff below offered *E. Fuller*, (who was the *indorsee* of the *defendant* and the *indorser* of the *plaintiff*,) to prove that the defendant had promised to pay *him*, the witness, the amount of the note sued on. The competency of the witness being objected to, the plaintiff produced the above entry as evidence of a release to the witness. The defendant still objected;

- 1st. To the sufficiency of the release.
- 2d. To the plaintiff's right to make it.
- 3d. That if sufficient as a release, it discharged the defendant from liability in this action, and the plaintiff ought not to be permitted further to prosecute it; and that *Fuller* was still an incompetent witness.

These objections were overruled, and the witness was permitted to testify. There is no shewing more definite as to what the witness did swear. A verdict and judgment having been rendered in favor of

the plaintiff below, Kennon, the defendant, prosecutes this writ of error, and assigns as causes,—

1. The overruling his objections to the competency of *Fuller* as a witness, and his exceptions respecting the *effect* of the supposed release.

2. That the fact, the witness was introduced to prove, was inadmissible testimony.

No other question appears to have been made below, reserved for the consideration of this Court, than that respecting the *competency* of the witness to prove the promise of the defendant to pay him (the witness) the amount of the note sued on, and the effect of the release, if valid.

Respecting the *admissibility* of the evidence, no objection appears to have been made, unless one of the reasons assigned against the *competency* of the witness, (that the evidence sought from him would discharge the defendant from liability in the action,) can be so regarded. It is clear, however, that if a plaintiff be about to introduce evidence which will have the effect to defeat his action, the defendant has no right to object to its introduction. It is equally obvious that he can not avail himself of such matter as an objection to the competency of the witness. If evidence introduced by a plaintiff has no tendency to support the action ; or if it can operate to defeat it, by discharging the liability of the defendant, or otherwise, it is the undoubted privilege of the latter to avail himself of this advantage, by motion to the Court for instructions to the jury respecting the legal effect of the evidence, and if not given, can assign the failure as error. But here, if the release could have had any such effect, (which is by no means admitted) it does not appear that any instructions to the jury were either requested or given.

Then it remains for me to enquire, whether Fuller was a competent witness to prove Kennon's promise to make the payment to him?

The rule of practice in this respect has undergone material changes. At an early period in the history of jurisprudence, it was generally held, that if a witness had an interest in the *question* put to him, he was incompetent. "But a distinction has since been made between an interest in the *question* put to the witness, and an interest in the *event of the suit*; and the general rule now established is, that a witness will not be disqualified on the ground of interest, unless he is interested *in the event of the suit*." Such is declared to be the modern rule in the English Courts, and the same has been frequently recognized in the United States. In *Van Nuy's vs. Terhune*,¹ the Supreme Court of New York, says, "The rule by which a witness is excluded on the ground of interest, seems to have fluctuated, at different periods, but on a careful examination of all the authorities, ancient and modern, the general rule will be found to be, that if a witness will not gain or lose, by the *event* of the cause, or if the verdict cannot be given in evidence *for or against* him, in another suit, the objection goes to his *credit* only, and not to his *competency*. Generally, therefore, an interest in the *question* alone will not disqualify the witness, but the objection goes to his credit only:" they add, "we do not mean to say but that there may be some technical exceptions to the rule; but the rule in its general application is correct, and is the one adopted by the Court." (See also *Phelps vs. Winchell*.) That this witness was interested in the question, there can be no doubt. I will enquire if he was not also in the event of the suit.

¹ Phil. Ev. 36,
& authorities
cited.

² Johns. Cas.
82.

³ 1 Day, 270.

A case mainly relied on by the counsel for the plaintiff in error is, that of *Stephens vs. Lynch*. That was an action by the endorsee against the drawer of a bill of exchange, payable to *Cleland*, and accepted by *Jones*. There being no direct evidence of notice having been given of the dishonor of the bill, *Cleland* was tendered as a witness to prove that the defendant had subsequently acknowledged his liability upon it, and promised to pay it. The witness was objected to on the ground of interest. *Lord Ellenboro*, remarked, that the objection would exclude the party to a bill in every case where he comes to assist the plaintiff; and decided that *Cleland* had not such a direct interest in the event of the suit as to exclude him.

This was a decision at *Nisi Prius*, and the question does not appear to have been elaborately argued, or deliberately examined by the Court: no authorities appear to have been quoted, nor was any reason given, except as noticed, that "the objection would exclude the party to a bill in every case where he comes to assist the plaintiff." I may be permitted to remark, that this consequence does not necessarily follow; for if the party called had endorsed without recourse upon himself; or if his endorsement was subsequent to that in favor of the plaintiff, these, or other similar circumstances, would materially vary the question of interest, or clearly show him to be indifferent. In cases where the witness is clearly interested, if his interest be *equi-ponderant*, by a like responsibility to one of the parties, in either event of the suit, his interest being neutralized, he is competent; though interested in the *question* or *subject* of the suit, he is indifferent to the result of that action.

It is true the case referred to of *Stephens vs. Lynch* has been quoted as authority by *Starkie* in his *Treatise on Evidence*; by *Phillips* (2 vol, 40) and by *Chitty on Bills*, (417)—without any expressions of dissent; and has in some instances been recognised by Courts of respectable authority. In the late treatise on *Pl. and Ev.* by *Saunders*, (vol. 1, 316,) its authority is also recognised, and this reason assigned in support of the principle; that though a recovery and satisfaction in the suit by the subsequent indorsee against the prior party, would extinguish and destroy the debt, and of course exempt the witness from farther responsibility to any one; when a failure might subject him to the necessity of paying the debt; yet his liability would not be certain, and should he be even compelled to pay, he may afterwards seek his redress against the same original defendant, or some other prior party. The force of this reasoning may well be questioned. It is very evident that these considerations do not neutralize the witness' interest: for though it be not *certain* that a recovery can be effected against him, such is the legal presumption; and if it be had, he must then pay the debt, and seek his redress against a defendant, who has once successfully resisted the demand, or some other prior party to the security, who may well be presumed entitled to the benefit of the same defence, which has once prevailed in favor of another in a similar condition. This view of the subject, is, I think entitled to great weight, under the peculiar circumstances of this case; the most material of which is, the great lapse of time, during which it may be inferred, Fuller the witness, slept upon his rights. The indorsement from Kennon to him, is without date, and would there-

fore refer, in the absence of other proof, to the last anterior indorsement, which is that in favor of Kennon, bearing date more than four years prior to Fuller's indorsement to the present plaintiff. This fact suggests the probability, that by *laches*, or otherwise, Fuller had lost his remedy on the note. If so, there was a strong inducement for the manufacture of evidence to restore the demand: in an action by Fuller, he could not expect to be admitted as a witness; then shall a mere assignment from him to the plaintiff, have the effect to remove the objection of interest, and establish the competency of the former as a witness. I maintain, that the indorsement alone, is not evidence even of a consideration passing between the parties to it, *as against the defendant in the action*. It would be sufficient to authorise a recovery against the defendant, in favor of the last indorsee, no other objection being interposed, because then the defendant would be indifferent whether the recovery be in favor of one indorsee or another; and if the last indorsee (properly constituted) hold only as agent, he may recover as indorsee alone for the benefit of his principal against any party who would be directly responsible to the latter. Then, while such may be the nature of this assignment, and while the law recognizes the indorser's *interest* in the *event* of the suit, it appears to me that no sufficient equi-ponderance can be supposed to exist, to remove the objection.

But aside from any peculiarity in this case, and admitting the relaxation of the rule of evidence to its full extent, that interest in the *question*, or *subject* of the suit, is an objection only to the *credibility*, and not to the *competency* of the witness; there is still strong authority for the rejection of this witness.

5 T. Rep. 578.

In the case of *Buckland vs. Tankard*,* the action was by the indorsee of a bill of exchange against the acceptor. The defendant called *Gregson*, who was the first indorser, to prove that the plaintiff had no property in the bill—that *Gregson* had only delivered it to him to receive payment from the defendant, and not with intent to convey any interest to him; for that in truth he had not paid any consideration for the bill. *Gregson* admitted on examination that he claimed an interest in the bill. Lord *Kenyon*, at *Guildhall*, rejected him, as being an interested witness. The case being removed into the Court of *King's Bench*—*Kenyon*, Chief Justice, said the whole question turned on this—*whether the witness's situation would or would not be bettered by the event of the verdict in the case*. He was still of the opinion that it would: “for, if the plaintiff should succeed, *Gregson* would be put to much greater difficulties to get back the money than if the plaintiff should be foiled by means of his testimony;” and therefore, on the ground of *interest*, he thought the witness was properly rejected; and such was the opinion of that Court.

The same remarks are equally applicable to this witness. His situation, as disclosed by the record, established his interest, no less than the admission of *Gregson* did his: (and without the admissions the law would have implied an interest against the party calling him :) the fact sought to be proven in both cases, was an alleged agreement or promise between the witness and the party against whom he was introduced. Here it may be observed, *Fuller* was introduced to prove a promise to pay to *him* individually, by his immediate indorser. If the plaintiff could

not recover against the indorser—the promise insuring equally for the benefit of the former^a—from that circumstance alone, it might be inferred that Fuller could not—that the *laches* would interpose an equal bar to any action he might bring. Then may it not well be said, that, if the plaintiff in this action fail, the witness will be left in a much worse situation than if he succeed.

There are various other decisions in the *English Courts*, recognising the same principle. Eminent Judges have declared the subject to be one of great difficulty and embarrassment; and that the decisions relative to the competency of witnesses, in respect to their interest, have been so variant and conflicting, that it has been impossible to reconcile them; and that the question must often depend on the peculiar circumstances of the case in which it arises.—(See *Burt vs. Baker, et al.*^b)

I will also notice a few American cases on this point. In *Herrick vs. Whitney*,^c the action was by the indorsee, against the maker of the note. *Fitch*, the indorser, was called by the plaintiff to prove the execution of the note by the defendant. He stated that he had transferred the note to one *Cummings*, in payment for a pair of horses, but at the risk of *Cummings* as to the solvency of the maker, and that he had no interest in the suit—yet the defendant's counsel objected to the competency of the witness; and the question reached the Supreme Court. There it was ruled, that the witness was responsible upon an implied warranty that the note was not *forged*; that he therefore had a direct interest in establishing the fact he was called to prove, and was incompetent. The Supreme Court of Massachusetts has also held, in more than one case, that in an action by the in-

^aChit. jr. on B.^b3 Term R. 27.^c15 Johns. 240.

dorsee against the drawer, the indorser is not a competent witness to prove the *hand-writing* of the drawer, without a release, or its equivalent—a discharge from liability on the indorsement.—*Barnes vs. Ball.*

¹ Mass. R. 73

² 3 ib. 225.

Rice vs. Starnes.^b

^c 2 Day, 339.

In the case of *Owen vs. Mann*,^c the question of competency occurred on the trial of an ejectment, in which the controversy solely regarded the title to the estate demanded. *Mann*, the defendant, having purchased, with warranty, from one *Barber*, had given to the latter his note for the purchase money. The note had been assigned by *Barber*, who appeared to be a man of property, to *Jones*, and after the commencement of the ejectment, the latter applied to the defendant for payment. After some hesitation, the defendant paid the note, on condition that *Jones* should refund the money, if judgment in the pending action should be rendered against the defendant. To this effect *Jones* executed a covenant, in which it was agreed that the note should remain in his possession, as if nothing had been advanced upon it; so that, in the event of a recovery by *Owen*, against the defendant, he might take his remedy against *Barber*, his indorser. The Supreme Court of Errors adjudged the witness incompetent, on the ground of interest. They said, if the *interest is counteracted by an equal interest* on the other side, the witness is competent. But if there be the least *inequality* of interest—that is, if a recovery on one side is more interesting to the person called, in a pecuniary point of view, than on the other, he cannot be permitted to testify. They considered it manifestly clear, that *Jones* was not an indifferent witness, for the reason, that if judgment should be rendered against the defendant, he, *Jones* would be obliged *immediately* to refund the money received of

Mann, while his demand for a similar amount on *Barber*, might be long postponed—then be sought after with great expense, and eventually fail, through *Barber's* insolvency. They assimilated the situation of *Jones*, to the condition of bail, when called by his principal, whose incompetency they considered too well settled to require the formality of proof; but whose situation was less objectionable than *Jones's*.

The authorities already reviewed, and the reflections advanced, appear to me to establish sufficiently the incompetency of this witness; but there is one other consideration strengthening this conclusion. It is this, that whether an indorser who has paid off the bill or note to a subsequent indorsee who has obtained a judgment on the same, can not, by mere operation of law, claim the right of cession or subrogation to all the benefits of the judgment, is at least questionable; and that he can have his benefit by an assignment of the judgment, seems to be settled.—

(See *Braham & Atwood vs. Ragland, Turner, et al.*) <sup>*3 Stewart, —
and authorities
there cited.</sup>

This may be considered nearly tantamount to an independent right of cession; as it may be assumed that the plaintiff in the judgment would, generally, consider it a sufficient inducement to assign his interest to any one who would pay him the amount demanded. Under this principle, one in the situation of *Fuller*, supposing his right of recourse on the note to have been lost, would be enabled to restore it indirectly, by assisting his indorsee to recover the judgment, then paying it, and receiving a cession, or an assignment of it. In this view, he would be materially interested in the event of the suit.

From this examination of the subject, I think it results, that as a general rule, an indorser of a note or bill is incompetent in respect to his *interest*, as a wit-

ness in favor of a *subsequent* indorsee, to charge any party to the instrument whose liability is *anterior* to his own ; and that the objection to the competency of this witness is more obvious from the peculiar circumstances of the case, already adverted to.

I have examined the case independently of the supposed release, because we think it can have no effect as such. It cannot be regarded as a part of the record, *Fuller* being no party to the suit : and not being signed, sealed or delivered to the witness, it can not be regarded as a deed, or sufficient evidence of any contract. A further objection to it is, that it imports only a discharge from any interest *in that action*, and would not necessarily operate as a release from his liability to a *subsequent action as indorser* of the same note.

We are therefore of opinion, the judgment below must be reversed, and the cause remanded.

TROTTER *versus* CROCKETT.

It is competent for a defendant to show by testimony, that an instrument assigned as a conditional payment or collateral security of a pre-existing debt; was good and available in the hands of the plaintiff, at the time of assignment and afterwards.

A judicial insolvency can only be established by an exhaustion of all the means supplied by law against the purse of a debtor: and the insolvency of a party will not be presumed on the bare return of *nulla bona*, to a *feri facias* issued against his effects.

The holder of an instrument, (transferred as conditional payment or collateral security) is not bound first to sue thereon,—or to offer to, or return the same; in order to maintain an action on the original debt or consideration, intended to be secured by such instrument.

Where paper securities have been transferred as an *absolute payment* of a pre-existing debt, then no resort can be had on such debt, or its original consideration—and the party receiving the same must take his recourse on the paper so transferred—(unless indeed they be forged, or fraud be committed in the representation of their value.)

But if the transfer of paper be intended merely as a conditional payment, or as a collateral security, the successful pursuit of the original debt, will depend on the fact, whether or not *laches* has been committed by the holder, whereby any liability on it has been lost to the party transferring it.

This action was trespass on the case, instituted by the defendant in error, in the Circuit Court of Lawrence.

The plaintiff declared, (with other counts,) on an undertaking in writing, executed by the mercantile firm of Trotter & McGonegal, (of which Trotter was survivor,) whereby, the latter, in consideration of goods, wares and merchandize before that time sold and delivered, agreed to pay the plaintiff a certain amount of money, *in cash notes, on solvent men in Lawrence county*.

The declaration averred, that the notes (which it appeared had been transferred, in pursuance of the agreement,) were wholly valueless, and useless in the hands of the plaintiff, whereby an action had accrued,

&c. During the trial, the defendant offered to prove, that certain of the notes transferred, were good, and had been lost through the negligence and *laches* of the plaintiff, which proof the Court rejected. The defendant asked the Court to instruct the jury, that if they believed from the evidence, that by proper diligence the amount of certain of the assigned notes could have been recovered from the payors—or that the same had not been returned, or offered to be returned, to the defendant; the action was not sustainable: which the Court refused, and charged the jury, that the transferee of a note was not bound to pursue the transferor, in order to return it.

Judgment on the verdict of a jury, being rendered for the plaintiff, the defendant brought the case, by bill of exceptions, into this Court.

ORMOND, for Plaintiff.—We maintain, that the reception of the contract of indorsement, imposed on the receiver of any note, under the contract, to pay cash notes, the obligation to use due diligence, or at least an offer to return the note. The Court, therefore, erred in instructing the jury, that the plaintiff was not bound to pursue the endorser. One of these notes was endorsed by Green. Crockett received this note, among others, and gave up the agreement. He received it then in the same way that others receive such notes, that is to pursue the endorser with due diligence. If he did not pursue the endorser, he should at least return the note or notes, so endorsed. This he is certainly bound to do in all cases, unless the notes be clearly of no value. Green was unquestionably solvent. He was the endorser, and not the maker. I am not sure that this does not come up to the literal fulfilment of the contract. But at any rate,

the party might receive such endorsement; and he did receive it. He brought suit upon the note; brought it wrong; suffered a non-suit; made no effort to return the note; kept it ten or twelve years, till his remedy was lost; and now seeks to make us liable upon the original contract. Why was the note, for which Green was bound, not paid long since? Merely because Crockett held the paper, and neither offered to return it, or pressed the collection of the debt.

The Court also erred, as we contend, in rejecting the evidence offered by Trotter. The maker of one of the notes was solvent at the time of the endorsement, and continued so for some time afterwards. The party did not agree to guarantee the continued solvency of the makers or endorsers of the notes; and the Court cannot extend the contract beyond the agreement of the parties. The return of *nulla bona* against Harris, was therefore, not conclusive; and it would not have been so, if the contract had even extended to the continued insolvency of the maker of the note. Such return could only be *prima facie* evidence; and the Court should have permitted us to prove that we had complied with our contract, and had transferred notes on solvent men to the obligee.

Besides, I make the point, that the plaintiff should have proved that he used due diligence. He cannot stand on a better footing than an assignee under the Virginia statute, who is permitted to sue in his own name. He must shew that he has used due diligence.

The case, however, does not rest on want of proof. There is proof that due diligence was not used; that suit was brought in an improper manner; and that a non-suit was suffered, which is a voluntary act.

P. ANDERSON, *contra*.—The case shews an obligation due, to be paid in cash notes on solvent men in Lawrence county. Among the notes delivered, was one on Perine, endorsed to Green, and by him to Trotter. The obligation, let it be observed, was to pay in *notes*. An endorsement is not a note. The maker of a note is bound directly; the endorser, upon a contingency. If it be pretended that the endorsement was taken as a note, it must have been upon a new contract. Where is the contract? The counsel speaks of *due* diligence: upon what principle was diligence *due*? We were bound to receive notes; and we could not tell the solvency till tested by a suit. The endorsement of Green simply enabled the plaintiff to sue in his own name. We could not refuse the endorsement; but we did not receive it in payment: it was the note that we received in payment, on the implied condition, however, that Perine was solvent. Our commencing a suit against Green, was only so much more than we need have done. This was the act of one of the parties only, and no evidence of contract.

But it is said that we ought to have returned the note. That depends on the question, whether we made any contract to that effect. The most that can be conceded on the subject is, that all the circumstances might have been left to a jury, to determine whether they amount to any evidence of contract, to receive the endorsement, or to return the paper.

If one has the property of another tortiously in his hands, he is bound to return it without demand; but if it be put into his hands by the other party, that party must demand the property before the receiver is bound to return it. If the note is worth nothing, it need not be returned. Well, Perine got a perpetual

injunction against the note. It was then of no value. But, it is said, the endorsement was of some value. Perhaps it might have been; but according to the view which I take of the subject, this is unimportant. The Court did not err in refusing to usurp the province of the jury, and decide how far there was evidence of any contract, to pursue the endorsement, or to return the note. If we received the endorsement as collateral security, and not as payment; it is clear that we might have sued upon it—that we were not bound to return the note; and yet we would have been under no obligation to continue to follow up the claim against Green.

The jury in this case, having found against Trotter, it must be presumed that they found that there was no contract to receive the endorsement as conditional payment, or to return the note.

Besides, Trotter received this note from Green after it was due, as conditional payment of a merchandize account. Perine told Trotter that it was a gambling note, and that he would not pay it. Was it not bad faith then, to have passed it off? The note being of no value, Trotter could have sued on his merchandize account: the return of the note was therefore unimportant.

That to have instructed the jury as required, would have been usurping the province of the jury, sufficiently appears from the decision of the case when it was here before. The Court is referred to the opinion then given.

As to Harris, it is said that Trotter offered to prove that he was solvent at the time of endorsement, and for some time after. It does not appear that exception was taken to the opinion of the Court on this point; nor does it appear that any particular testi-

mony was given, or that any witness was introduced. A mere offer to prove was not sufficient. The express testimony that the Court rejected, should have been shewn. "Solvency" requires a definition. It must be legal solvency; that is, the man must be in a condition that money can not be made out of him by execution. The want of this solvency, the return of *nulla bona* establishes. This is not merely *prima facie*. The insolvency of Harris being thus established, would the Court permit a witness to come in and say, "I know this person has property in such a county," and thus require the party to pursue the supposed property in that quarter? He might in the same manner be driven from point to point, for an indefinite length of time. The introduction of evidence in such a case to contradict the sheriff's return, is not allowable.

HOPKINS, in reply—cited *Marr, ex'ix, vs. Southwick, Cannon & Warren, page 351 of this volume—Minor's Rep. 314—1 Stewart, 370.*

By Mr. Justice THORNTON:

This was an action on the case, brought by the defendant in error, in the Circuit Court of Lawrence county; the declaration in which, contained various counts, and among them, one on a special assumpsit in writing, whereby Trotter & McGonegal, a mercantile firm, of which Trotter is survivor, promised to pay to Crockett, the sum of three thousand five hundred and sixty five dollars and fourteen cents, in cash notes, on solvent men in Lawrence county, Alabama, on or before the 1st of January, 1822, for value received. During the progress of the trial, a bill of exceptions was taken, on which the assignment

of errors is made in this Court, which relates to the rejection of testimony offered by Trotter; to the refusal to give instructions which were prayed for by him; as also to the charge given. We think there is no good objection to allowing the first assignment to be made. The bill of exceptions shews, that the rejected testimony was offered; and excluded on the motion of Crockett's counsel; and though the words "to which opinions the defendant excepts," are at the close of the bill of exceptions, we think they embrace every matter of opinion contained in it. With regard to the language in which this matter is set forth in the bill, it is that usually adopted; and I think it necessarily implies, (the record not shewing the contrary) that the means of making the proof offered were present, and instantly available.

It appears that, when the note described, as above stated, in the count, became due; by endorsement in the name of the said firm, promissory notes were transferred to Crockett, to the amount of the said note; and that it was surrendered by him to the makers. Among the notes so transferred, were two of the following description: one made by James Perine to William Green, due 4th April, 1821, and assigned by him to plaintiff in error; the other made by Joel D. Harris, due 15th January, 1822.

The evidence offered by Trotter which was rejected, was, that the maker of this last note, Harris, was solvent, at the time of its endorsement to Crockett, and afterwards.

The assignment of error presents but two questions for our consideration. The first is, whether, according to the true intent and meaning of the written contract of Trotter, irrespective of any agreement at the time of endorsing these notes, the note of Harris

did not, to the extent due upon it, constitute a payment and satisfaction of the original note or contract sued upon.

The second question is, whether if *laches* have been committed by Crockett with regard to the other note, whereby the liability of any party, who was on it, was lost to Trotter, he would not also be entitled to a credit to that extent. The first point above stated, is embraced by the assignment relating to the rejection of the proof, that Harris, the maker of one of the endorsed notes, was solvent at the time of the endorsement, and subsequent thereto. A just construction of the original contract or note, will determine the propriety of the rejection of this testimony. The contract was to pay in cash notes on solvent men, &c. The exclusion of the evidence was, I apprehend, on the ground, that by the contract, solvency at the date of the endorsement was immaterial. The Court did not decide, that no proof could be adduced, to prove solvency, at the date of the return of *nulla bona* to a *fi. fa.* which had been issued to the sheriff of Lawrence county, on the judgment in favor of Crockett on the endorsed note. No such proof was offered with sufficient distinctness to be regarded; for the term "afterwards," though it may extend to any indefinite future period, yet on the principles of construction applicable to bills of exception, is not to be so understood; and it may well consist with total insolvency at the date of the sheriff's return, that *after the endorsement*, Harris was perfectly solvent. If, however, it was intended to be decided, by the Court, that the return of *nulla bona* in that judgment, was conclusive against Trotter, it was, to my mind clearly erroneous; for at most, all that a return of *nulla bona* can be evidence of, is no visible effects within

the county, of which the sheriff making the return, is the ministerial officer; and is perfectly consistent with the possession of ample estate, just beyond its boundary; which would be a sufficient defence, unless the words of the contract, "solvent men, in Lawrence county," mean not only that the men must be solvent, but that their property, and residence must both be, in that county: which I do not consider to be a fair interpretation of them. The Court, however, did decide, and the counsel for Crockett now insist, that solvent men, in the meaning of the contract, are such only as shall have effects to satisfy an execution, which shall issue upon a judgment in favor of Crockett, on the cash notes to be paid. This would clearly imply an obligation on Crockett to bring a suit on the note. But the doctrine is well settled, that without, an express contract, the holder of paper as a conditional payment of, or as collateral security to, a pre-existing debt, is not bound to sue upon it at all;* and if these notes were not transferred in ^{1 Cranch 181.} one or the other of those ways, he cannot sustain his action at all on the original consideration. It cannot be adopted as a proper construction of the contract sued on, that any suit was to be brought by Crockett on the notes to be transferred, before he could recover in an action for its breach in the particular of the solvency of the makers of those notes. Suppose that those notes were transferred without any knowledge by either party of the pecuniary condition of the makers, and that upon enquiry it were ascertained, that one or more of them, though never sued in their lives, were upon the parish as paupers at the time of the transfer, would it be necessary to sue in such case in order to recover of Trotter for a breach of his contract? I apprehend that it would not. Now, if

on the one hand, it can be alleged and proven, that the maker was insolvent, without any suit against him; as a necessary consequence his solvency can be established on the other hand, by the kind of proof here offered and refused. It is argued that the true construction of this contract is, that there is a warranty not only of present solvency, but a prospective warranty of continuing solvency, until by the due prosecution of the means afforded by the laws of the country, the fact of solvency, *vel non*, is in that manner ascertained. To sustain this construction, reference is made to the decisions of the Courts of Virginia, regulating the recovery by assignees against assignors, of such instruments as by the laws of that State are authorised to be assigned. It is true, that upon an indorsement in blank, or in the common form, the Courts in that State have said, that a recovery may be had, as for a consideration which has happened to fail, notwithstanding the use of the means of the law, as far as a *fi. fa.* returned *nulla bona*, to render it available. But even there a special indorsement would vary the implied rule of liability, and if indorsed so as to raise the implication, that the liability was to be more restricted, than the implied responsibility, the special understanding would control. But even if the word solvent, is construed to mean ability to pay according to law, I would maintain that all the means which the law supplies, must be exhausted, before insolvency could be affirmed. Now, a *fi. fa.* is not the final test: in this State, at least, it is not the ultimatum which is afforded. The law gives a *ca. sa.* to reach the secret treasures of the debtor, as a *fi. fa.* does, his property, subject to levy. A judicial insolvency then, I think, is only established fully, by this final process of execution. For the er-

ror in the Court below, in rejecting the testimony offered, the cause would have to be reversed, but as it must be remanded for a new trial, it is thought proper to consider the law, which from the proof exhibited in the bill of exceptions, will be most probably applicable to the state of facts that will again be established. The notes in this case, must, of necessity, have been endorsed over, either in absolute discharge of the original contract, or as a conditional payment of it; or as a collateral security to it: and the question as to the precise manner intended, is one, which from all the circumstances of the case, must be determined by the jury. If the transfer were intended as an absolute payment, then there can be no resort to the original note, nor to the original consideration of that note. The note to pay in cash notes, &c. had extinguished the open account; and the transfer, if in payment, had extinguished that note; leaving the only recourse of the party so accepting them, on the transferred notes, unless indeed, they be forged, or a fraud has been practised; as by falsely representing the parties to the said securities to be solvent, when they were not. If the transfer were intended as a conditional payment, or as a collateral security, then the successful pursuit of the debtor on the original consideration, which in such case, is the only subsisting ground of action, will depend on the fact, whether or not, any *laches* has been committed with regard to the transferred security, whereby any party whose liability could have been retained, or secured to the party transferring the note, or bill, is lost. If such *laches* has occurred, it will operate to that extent as an absolute payment.* And it would seem by the last decision of this Court, above cited, that in such case the insolvency of a party whose liability had

1 Wash. C. C.
Rep 156 — 1st
Porter's Rep.
1st ed. 260.

been omitted to be fixed, would not vary the case. For although insolvent, as far as legal coercion is concerned, yet a demand of the money might have resulted in its payment. I do not find the doctrine to be, that where a bill or note is transferred by endorsement, as conditional payment, or collateral security, and afterwards suit be brought on the original consideration, that successful resistance can be made to a recovery, by shewing that all the diligence has not been used, which would be necessary, to enable the indorsee of such transferred bill or note to recover against the indorser as such, if it had been received in absolute discharge of the original debt. The extent of the doctrine, I apprehend is, that the recourse of the person from whom the bill or note is received against any prior party must not be lost, nor such delay occur in giving notice to the person from whom it was received, of the refusal to pay, as in the estimation of the jury would be unreasonable. As to the return of a bill or note, which may have been transferred as a conditional payment, or collateral security, I do not consider that its return, or an offer to do so, is necessary, to authorise the institution of an action on the original demand.

A creditor may lawfully take and hold several securities for the same debt, and ought not to be compelled to yield up either, until the debt is paid.* It is true that a double satisfaction cannot be had; but on principle, it seems to me, that all collateral securities, honestly acquired, are to be allowed to be retained until their object is accomplished.

It is laid down in 1st *Cranch*, 181, that it is not necessary to return a note received as a conditional payment, prior to the institution of a suit on the original contract; for the reason, that it is not an extinguish-

*2 Wheat. 390.

ment of that contract. The utmost that justice would require is, that the plaintiff should shew that he has not derived benefit from it. If it has been transferred, so that in presumption of law, he has derived such benefit, by which means too, the defendant might be subjected to its payment, then unless it be regained, so that he have it in his power to return it to the defendant, he should not be permitted to recover. In the case of a collateral security, I feel confident that the plaintiff ought not to be compelled to return it, until the debt is actually paid. But, in regard to paper, transferred as conditional payment, though not necessary to be returned before commencement of suit, it would seem perfectly correct, that it should be delivered up, or at least satisfactorily accounted for, before the rendition of judgment.

This doctrine of diligence, on the part of one who accepts negotiable paper, as collateral security, or conditional payment, is not peculiar to this class of cases. It is applicable alike, the diligence varying according to the nature of the thing, whether paper security, or property of any other kind, be received in the same way.

The necessary care and attention should be bestowed to preserve the value of whatever is thus voluntarily, and with a view to one's own interest, taken under his control.

If the diligence which is necessary to preserve its value be onerous or hazardous, its assumption may be declined altogether, or it may be regulated by express stipulation.

In the absence of any special contract, I think the purposes of justice can only be accomplished, and the decisions in former cases in this Court, and elsewhere, only reconcilable, by adopting the principles

above laid down, as it respects the mutual rights and liabilities of parties standing in the relation of transferors and transferees of notes, or bills, by endorsement or otherwise, as conditional payment, or collateral security, of an original demand or duty.

Let the case be reversed and remanded.

MAY and MAY, Executors, *versus* EASTIN.

The refusal of a Chancellor to dismiss a bill, for want of security for costs, is not a ground for reversing a decree in equity—excuses for a non-compliance with the letter of the statute, being necessarily, subject to the discretion of the Court.

In determining between an absolute sale and a mortgage, the Court, will take the intentions of the parties, from a view of all the circumstances: and where it is evident that a *prima facie* absolute sale, was intended as a pledge, the Court will relieve against the sale, and suffer a redemption.

Where A, having slaves levied on under execution in favor of the Tombeckbee Bank, and being about to discharge the same by payment of the notes of that Bank, was hindered from so doing by the representations of B, that it would not be a good payment, but who, on an agreement with A, paid off the execution in the same money, and took a purchase of one of the slaves, (with a condition of redemption in three months:) the Court, on a bill filed after the expiration of three months, held the transaction a mortgage, and decreed restitution, on the payment by A, of *one half* the nominal value of the Tombeckbee Bank notes, paid by B, in discharge of the execution.

The general rule, that a mortgagor, seeking to redeem, must pay costs, does not apply to a case, where the mortgagee sets up an absolute title in himself.

This case came up by appeal from the Circuit Court of Greene, exercising Chancery jurisdiction. The bill was filed by Eastin, praying the redemption of a negro slave.

The facts, so far as material to the case, were as follow:

Eastin became indebted to the Tombeckbee Bank, and to secure the payment of the amount due, executed his deed of trust for several negro slaves, and other property to the said Bank; subsequently, under an arrangement with Buchannon, the testator of the defendants, the said property was purchased under a sale by the Bank, and delivered to the complainant, under a certain specified agreement, whereby the debt due by complainant to the Bank was to be discharged, and the property, then in the possession of Eastin, to become absolutely his. After Buchannon's death, there being a balance due on the debt aforesaid, James May, one of the defendants, procured judgment thereon, and had execution issued on the same, in the name of the Bank. The execution being in the hands of the sheriff, a friend offered to loan the complainant the amount of his debt to the Bank, in Tombeckbee money, then fifty per cent. below par; which the sheriff, under May's directions, refused to receive. May then selected one of the complainant's most valuable slaves, and proposed to take the negro, and advance the amount of the execution, and if complainant, in three months, refunded the money, the slave should be returned. The complainant having assented to this proposition, the said May paid off and satisfied the execution, in *Tombeckbee money*, and took the slave into his possession.

The Chancellor, on a final hearing, decided that the transaction was a mortgage; and decreed restitution, on the payment by complainant, of one half the nominal value of the Tombeckbee notes, paid by defendant in discharge of the execution against complainant's property. The Court also decreed costs against the defendants to the bill.

The assignments of error, appear in the opinion of the Court.

ERWIN, for Plaintiff in error, contended—That the Court erred in refusing to dismiss the bill for want of security for costs, pursuant to the statute, Eastin being a non-resident. Security was regularly required on the 18th of September, 1829; and at the next term (March, 1830) the Court refused to dismiss the suit, on motion of the present plaintiffs in error, but permitted security then to be given for the retrospective costs—six months having elapsed after security was required, and during which no security was given. The statute requires the suit to be dismissed, unless security be given with the clerk of the Court within sixty days after the notice. The language is plain, positive and imperative. Shall its requirements be observed or not? *Aik. Dig.* 262. The Court improperly rejected the transaction as a mortgage: the Bank debt was paid off by May. But in the progress of the transaction, May offered to take the two slaves, until Eastin should pay off the amount. This would have been a mortgage; as it would have been *intended to secure the payment of money*; and that is the test. But Eastin did not accede to this proposition. He, on his part, proposed to make an absolute sale to May of the girl Dorcas, in consideration of his paying off the Bank debt; and to this May acceded. May indeed, afterward, agreed that if Eastin would repay him the money and certain other dues, within three months, he might have the negro again. This was no mortgage. It was not even a conditional sale; because this proposition was made after the sale had been completed. To have made it a sale, it should all have been done at

the same time. This was not a contract for the security of money, but an absolute sale, as May states on his oath. Can such a sale be explained away and converted into a mortgage? Certainly not. There were no circumstances of fraud in the case. The debt discharged by May, was equal to the value of the girl. If, after this transaction, the girl had died, is there any doubt that it would have been May's loss? There can be none. May would have had no remedy for the money he had paid. The bank debt was discharged, and the slave had been received in satisfaction. Such being the case, this could not have been a mortgage.—4 *Kent's Com.* 38. 1 *Pow. on Mort.* 120 to 127, note 2—138, note p.

The fair criterion, whether a conveyance be a mortgage, is, in the remediss being mutual, the vendee having all the remedies of the mortgagee.—*Hammond's Dig.* 363—2 *Cranch*, 237. A clause of privilege of redemption alone will not be sufficient of itself, to convert the transaction into a mortgage, where there is no bond or covenant for the payment of the purchase money.

Eastin says, a friend offered to lend him the amount in Tombeekbee money, to pay off the execution. May denies that any was offered, but admits that he instructed the sheriff not to receive such notes, as he had been informed they would not have been a good payment.

The sheriff was not bound to receive these notes. If it had been a suit against Eastin, the notes would not have been a set-off to the debt. The rule of law is clear, that a defendant can not go out, and buy up debts to subject a plaintiff to costs. Surely then Eastin could not offer these notes in payment, where he was not even defendant in the action. The exe-

cution called for gold or silver, and the Bank would not have been bound to receive any thing else. Eastin received *par* currency in the first instance; he could not have been injured in being bound to make payment in the same. A Bank demanding payment of another Bank, is not bound to receive its own notes in payment, because bank bills are only payable at the counter of the Bank where they were issued.—3 *Starkie's Ev. Part 4*, 1392—*Cox' Dig.* 81; 19 *Johns.* 332.

Where a bill is filed by a mortgagor to redeem, there being still a balance due, the rule is, that the complainant must pay costs. The Court, therefore, erred in awarding costs against May.

PECK, *contra*.—In regard to the motion to dismiss for want of security for costs, the record does not shew the fact that the complainant was a non-resident, nor that the same was admitted. The language of the motion says so; but that is no evidence; it is only an allegation.

In cases of this kind, the Chancellor must have discretion. Suppose it had been shewn, that from the absence of the clerk, security could not have been given, would the Court have been right in dismissing for that reason? The various reasons which may have induced the Court to refuse to dismiss, can not now be looked into, in the existing state of the record.

As to May's contract in taking the girl, it was not even a mortgage, but a pledge. A mortgage conveys the title: a pledge does not. In a mortgage, a man can not bring *trover* or *detinue*, after tendering the amount: in a pledge he may. It is said there must be an obligation to pay the money, where there is a pledge or mortgage. So there was in this case, as

the answer shews, an express promise on the part of Eastin. The answer speaks of the transaction as a mortgage or pledge, and speaks of allowing Eastin to *redeem*, a term not applicable to a sale. If the sale had even been absolute at first, the subsequent agreement would, according to the doctrine of *Kent*, have rendered it a mortgage. I do not admit that if the slave had died, it would have been May's loss. Eastin would still have been bound to pay the money. If it had been an absolute sale, instead of a temporary pledge, May would, in all probability, have taken a bill of sale.

The answer it is said, must be taken as true. That is the principle: so must the testimony of a witness be taken as true. But a witness may contradict himself; and so may an answer contradict itself. If, therefore, in one part of this answer the sale to May is said to be absolute, yet if other statements in the answer shew that it was but a pledge or mortgage, we are not bound to regard it as a sale.

The defendant, May, seems to have played an extraordinary part in this transaction. The execution was against himself; yet he controls it and directs what kind of money shall, and shall not be taken. He will not let Eastin pay off the execution in Tombeckbee money; imposes severe terms upon him; gets his slave into his own possession, and then actually pays off the execution in this half-price money. Under these circumstances, the Court was surely right in not requiring more of Eastin than the value of the paper paid by May.

As to costs, the general rule is as stated by the counsel for the plaintiff in error; but it has many exceptions. Whenever there has been an unconscionable defence set up by the mortgagee, or when he

has thrown improper obstacles in the way of redemption, the mortgagor is entitled to costs. The pledgee, here, by refusing to permit redemption, except upon terms not equitable, was the cause of suit, and of course, of the costs ; and therefore, that he should be subjected to the payment of costs, is no more than equitable.

By Mr. Justice HITCHCOCK :

The appellants contend for a reversal of the decree in this case, upon the following grounds :

I. That the bill should have been dismissed for an improper joinder of Patrick May with James May ; and also because the defendants are charged in their representative and individual characters.

II. That the Court had no power to refuse the motion to dismiss the bill for want of security for costs ; the statute being, as they contend, peremptory.

III. That there is error in the interlocutory decree of the Chancellor.

1. In deciding that the first purchase by Buchanan, was a mortgage.

2. In deciding that the purchase of Dorcas, by James May, was a mortgage ; and,

3. In requiring Eastin to pay to May only one half the nominal amount paid to the sheriff by May in Tombeckbee money.

IV. That the Chancellor who made the final decree, erred in giving costs to the complainant.

These several positions will be examined in the order in which they have been stated : and,

1. The bill charges a mortgage to have been made by the complainant to the defendant's testator. It charges also, that the last transaction, in the payment of the execution, and sale of Dorcas, was

a mortgage. It necessarily required answers from both of the defendants, and an account relating to their representative character, and as to James May, an individual account: it was therefore impossible to have a full and final hearing of the whole matter without making the executors of Buchannon parties; and the result, shewing that a decree was required to be rendered against one only of the defendants, and that in his individual character, does not present matter of error, and even if there had been improper parties to the bill, James May cannot complain on that account, if there is no other error in relation to himself.

II. As to the alleged error, in not dismissing the bill for want of security for costs, we think that was a matter in the discretion of the Court below. Though the language of the act is peremptory, and declares that when the security is not given within the time required, after notice, the bill shall be dismissed; yet the act being intended for the security of the defendant, and being no bar to a subsequent suit, the Court below, it is considered, has the power to control the suit, and to refuse the motion upon such terms as his discretion may dictate. This has been the invariable practice on the Circuit, and we are not at liberty to give any other construction to the act. There are so many circumstances which may arise, to excuse a party for not strictly complying with the letter of the statute, that to refuse to the Courts below any discretion, would often be productive of great injustice.

III. The third position to be discussed, involves the merits of the bill, and to it the attention of the Court has been principally directed.

1. The first division of this branch of the subject,

as to the character of the sale to Buchannon, we shall bestow but little time upon. It was evidently a mortgage: the circumstances and manner of the sale, the instructions contained in Buchannon's letter to John May, (though he calls it a purchase,) the payments made by Eastin on Buchannon's note in the Tombeckbee Bank, the possession by Eastin of the property, and the final settlement by James May, and relinquishment of the balance of the property after he had taken the slave Dorcas, all conspire to give to the transaction the character of a mortgage; and indeed we do not understand the appellants to contend for any other construction of the transaction, except in the event of our setting aside the sale of that negro: we shall therefore leave that part of the case, without further enquiry, and proceed,

2. To enquire whether Eastin has made out a case in his favor, in relation to the girl Dorcas.

He states in his bill, that after the sheriff had, by the directions of May, refused to receive Tombeckbee money in discharge of the execution, which, he avers, that he had found a friend who had agreed to advance for him, and which he avers to have been then fifty per cent. below par: he (May) "selected the favorite and most valuable negro, and proposed to Eastin that he would advance the amount of the execution if Eastin would consent to let him take her with him; and that if in three months Eastin should refund the money the said negro should be returned, otherwise to be absolutely his property." To which proposal, the said Eastin says he agreed, and that as soon as this was settled, the said May, at once paid the sheriff in Tombeckbee money.

The defendant states in his answer to this part of

the bill, "that after the levy by the sheriff upon two of the negroes, the said Eastin did speak of paying off the execution in Tombeckbee money, which was then under par, to which he (May) objected, because he had heard from a gentleman in whom he had great confidence, that the Cashier of the Bank had directed the sheriff of Clarke county not to receive the notes of the Bank in payment for its debts, from which he was induced to believe that the Bank would not probably receive their own notes in payment of executions; and being extremely anxious to have the business finally settled, without any further difficulty, cost or trouble, he was unwilling to receive any money but such as he knew would be taken by the Bank, without objection: that no notes of said Bank were produced or tendered by Eastin, neither does he believe he had any, and from his notorious want of credit and punctuality, he thinks it doubtful whether he could have procured any." He admits "that he did, in his *individual capacity* ultimately pay off said execution in Tombeckbee money, by assuring the sheriff that if the Bank would not take their own bills, he would be responsible in good money: he avers that he did not make a solitary cent by it, as he procured the notes from a friend, to whom he afterwards paid back the full amount in good money, without any discount or deduction." The answer further states, "that after Eastin spoke of paying the execution in Tombeckbee money, he (May) proposed to take two of the negroes, Margaret and Dorcas, and keep them in pledge, until he (Eastin) would raise the money due on the execution, and pay it off, which Eastin would not consent to. But that Eastin in his turn, proposed that May should take one of the negroes (which ever he chose) absolutely, and pay off

the execution, to which May agreed, and under which agreement he took Dorcas." He then says, "that after the business was all completely closed, that he (May) informed Eastin that he did not want to keep the negro, and that if he would in three months pay him the said money, the amount *he had paid on the execution*, and eighty dollars for his time and expenses in attending to the whole of the business, for which he held his testator's estate liable, and also the sum of forty two dollars and sixty four cents paid by his testator as a part of one of the instalments on the note due the Tombeckbee Bank, amounting in the whole to three hundred and thirty dollars, with interest thereon, that he, Eastin, might redeem and take back the negro, which the said Eastin promised to do."—The answer farther states, that "the said sum was not paid within the three months, and that on two occasions since, the said J. May has offered to return the negro to said Eastin, if he would pay the money and interest; and that on the last occasion he informed said Eastin, that unless he did pay the amount he (May) would be compelled to sell her, and proposed to him (Eastin) to consent to his selling her to John Gayle, jr. his brother in law, to which he (Eastin) consented."

Eastin in his bill, states that "he has proposed to leave the subject of their differences to arbitration, but which proposition the said May rejected, and that he refuses to return the negro to Eastin until he shall be paid the amount of the execution in good money, with the eighty dollars, his expenses, &c.;" he charges the negro to have been worth, at the time of her delivery to May, the sum of five hundred dollars, and her hire to be worth ten dollars per month.

May admits that he has refused to arbitrate; de.

nies that there are any differences to settle; avers the negro not to have been worth, at the time he received her, more than three hundred and thirty dollars, and that her hire is not worth more than five dollars per month.

These are all the material statements in the bill and answer, relating to this part of the case. They were submitted without testimony on either side, and it became the Chancellor to give such a decree as was consistent with justice, and the rules of equity. There is no written evidence of the transaction, the whole case depends upon the recollection of the parties, of what transpired at the time. It is not therefore strange, that under the circumstances in which the parties present themselves before the Court, and the state of feeling exhibited in the criminations and recriminations with which the bill and answer both abound, that there should be some discrepancies in their respective relations of the transaction.

If we take the statement in the bill, as containing the true history of the transaction, we should not hesitate to say that Dorcas was delivered as a pledge, which is defined to be "a deposit of goods redeemable on certain terms, with or without a fixed period of redemption," in which the delivery of the goods to the pawnee is essential to its validity, and when a redemption is allowed after the day of payment, if one be fixed.^a

^a4 Kent's Com.
138.

If we take that part of the defendant's answer which relates to this matter, we should say that it was an absolute sale, with an agreement for a repurchase within a given time, and which is totally distinct in its character from that of a pledge or mortgage, and which though narrowly watched, is still valid, and in which the time limited for the re-pur-

chase must be strictly observed, or the vendors right to reclaim his property will be lost. In the first case there is, in fact, no sale or transfer of title, the property remains in the pawnor, and the equity of redemption is secured; in the other, the title is transferred, and the transaction is considered strictly as an independent dealing with a stranger, and equity can give no relief.

In cases of this kind, it is the duty of the Court to get at the character of the conveyance, by looking into the intention of the parties, from a view of all the circumstances of the transaction. In this view, it is not very material to criticize the precise language which either party employs in the relation of it, or to stop long in scrutinising the various propositions made, or by which party they were proposed, whatever that may be, if the transaction in the first instance appears to have been intended as a pledge or mortgage, with a proviso for a re-conveyance within a certain time, such circumstance will vitiate the sale, and turn the absolute conveyance into a mortgage, and the proviso will be rejected as repugnant to the rule of equity, that the right of redemption can not be limited or restrained.*

*Pow. on Mor.
138.

In this case, May, though the defendant, (as executor of Buchannon) to the execution; must be viewed as the judgment creditor of Eastin, having his property in the hands of the sheriff; Eastin's circumstances are stated by him and admitted by May to be embarrassed, so much so, that May doubts his ability to raise enough Tombeckbee money at half its nominal value, to pay the execution, and which, even if he had been able to do, he had refused to permit the sheriff to receive. May admits that he did receive the negro for the amount of the execution, which was

two hundred and seventeen dollars; that immediately after the purchase was made, he informed Eastin that he *did not want the property*, and that he voluntarily offered to return it, upon being reimbursed, what was, as he conceived, but justly due to his testator's estate; that to this proposition Eastin agreed: Eastin considers the property to be worth five hundred dollars; May does not consider it worth more than what he is to receive, and on two several occasions after the time for redemption is past, he calls upon Eastin to redeem; and on the last, asks permission to sell the property to the brother in law of Eastin. The negro was a family negro, raised by Eastin's family, and received by him on his marriage, and either she, or one other in a similar situation must inevitably be sold to pay this debt, unless some arrangement, for a pledge or mortgage can be made. Is it not then, under these facts, the duty of the Court, to vitiate this transaction as a sale, and consider it a mortgage? Did not the relation of creditor, in which May stood, give him such an advantage over Eastin as to enable him to dictate his own terms; and would not the Court, if the transaction had been reduced to writing, and presented itself in the language employed by May in *his* answer, be authorised to give Eastin the right to redeem? If Eastin's estimate of the value of the negro is correct, she was worth more than double the amount of the execution; and if it could have been paid in Tombeckbee bills, at fifty per cent. discount, she was worth more than four times the debt. If May's estimate is correct, as to her value, and we are to take his statement that he did not *wish to keep her*, to be true, this object was only to secure his debt, and exonerate the estate of his testator. The whole trade, whatever it was intended to be, was made at

good terms as Eastin could have done it, and it is of no consequence that he paid a friend the full amount of the Tombeckbee bills in good money. The enquiry is, not how much he did make, but how much Eastin could have saved.

IV. There is only one point remaining, which is as to the costs of the suit.

As a general rule, it is true, that when a mortgagor comes to redeem, he must pay the costs of the proceeding. Yet there are cases in which the mortgagee is not allowed costs, but when he has been decreed to pay them; and one of the instances of this kind is, where the mortgagee sets up an absolute title in himself, which is the case here.* This Court, however, will not generally reverse a case after a full hearing upon the merits, merely on the ground that costs are decreed, though they might not have decreed costs, if the case had been before them as an original bill.

The decree must therefore be affirmed.

BOARDMAN *versus* POLAND.

It is definitely settled, that the Supreme Court will not look to the indorsement of a writ, for the purpose of finding error, to reverse a judgment.

Although it is error, that judgment should be entered for a greater amount than that claimed in the declaration, yet, judgment will not be reversed as to mere technical divisions of the separate amounts of debt and damages, when the aggregate amount of such judgment, is less, than the aggregate sum laid in the declaration.

Poland obtained a judgment by default, in debt, against Boardman, in the Circuit Court of Madison.

The cause of action declared on, was a promissory note, for the sum of three hundred and eighty eight dollars and six cents, which the defendant owed, &c. to the plaintiff's damage one hundred dollars. The clerk of the Court below, in entering up judgment against the defendant, rendered it for the sum of one hundred and forty eight dollars, debt, and one hundred and fifteen dollars, damages. Boardman took a writ of error to this Court, and sought a reversal of the judgment, on assignments which appear in the opinion of the Court.

S. PARSONS, for Plaintiff—McCLUNG, *contra*.

By Mr. Justice HITCHCOCK :

This was an action of debt on a promissory note. The declaration demands three hundred and eighty-eight dollars and six cents debt, and one hundred dollars damages. There was a judgment by default; and the clerk, under the statute, computed the debt, and damages, and judgment was rendered thereon for one hundred and forty eight dollars debt, and one hundred and fifteen dollars damages.

Two errors are assigned.

I. That there is a variance between the endorsement of the cause of action on the writ, and the declaration in the date of the note, and

II. That the damages allowed are greater than those claimed in the writ and declaration.

I. As to the first assignment, it has been repeatedly decided, that this Court will not look at the endorsement of the writ, for the purpose of finding error to reverse a judgment.

II. As to the second, this Court decided, in the *Ala. Rep.* 89. case of *Dinsmore vs. Austil*,* that where the judgment is for a greater sum than that claimed in that declaration, it is error: there was also, in the case, an error in the calculation of interest.

In the case of *McWhorter vs. Sayre & Sayre*, the damages claimed in the declaration were one hundred and thirty dollars, and the verdict of the jury was for two hundred and sixty eight dollars and ninety three cents: for this error the judgment was reversed.

*2 Stewart 225

It is conceived, that this case is distinguishable from the other two. Here, the aggregate amount of the judgment is for less than the aggregate amount claimed in the declaration—the amount of the debt being for much less, and the damages for fifteen dollars more. The clerk, in making up the sums might have included the whole amount as debt, and there would have been less than the amount claimed, as debt, in the declaration; and we do not think that when there is no error in the amount of the judgment, that we should reverse a case for any technical division of the sum—the declaration being sufficient to cover the whole amount.

The judgment must be affirmed.

HOPKINS *versus* THOMPSON.

Detinue, lies by the mortgagee, to recover possession of personal property mortgaged, after the time for the redemption of the mortgage, has expired. The question, whether a transaction was intended as a mortgage, or as an absolute sale, is one of fact, for the determination of a jury.

Hopkins brought an action of *detinue*, in the Circuit Court of Jackson, to recover the possession of certain slaves.

The record, disclosed, that a bill of sale for the slaves in question had been originally executed by one Hammons, to the plaintiff—that by a defeasance connected therewith, the said slaves were subject to redemption, on certain terms and conditions specified therein—that Hammons having failed to redeem the slaves, the bill of sale, by his acknowledgment, was considered absolute, and possession thereof, given to the plaintiff: that Hammons, afterwards, secretly took the slaves into his possession, where, they were levied on under judgments subsisting against him, and bought by Thompson.

In the progress of the trial, the Court below determined, that the transaction between Hammons and the plaintiff was a mortgage, and charged the jury, that an action of *detinue* was not sustainable to recover possession of the mortgaged property, without a foreclosure of the mortgage.

Verdict and judgment having been rendered for the defendant, the plaintiff took his writ of error to this Court.

HOPKINS, for Plaintiff—S. PARSONS. *contra*.

By Mr. Justice HITCHCOCK :

This was an action of *detinue* for two slaves. The evidence on the part of the plaintiff was, that in 1817, one Hammons made an absolute bill of sale of the slaves to the plaintiff, who on the same day executed to the said Hammons, a written defeasance, stating that Hammons was to retain possession of the slaves for twelve months, and if at the end of that time he should pay to the plaintiff the amount expressed in the defeasance, he would be entitled to the return of the bill of sale, and to the property in the slaves. That at a subsequent time, the plaintiff gave to Hammons another written instrument, in which he stated, that if Hammons should pay him within twelve months from the date thereof, three hundred and twenty four dollars, in addition to the six hundred expressed in the bill of sale, that the slaves should be his. That in April, 1819, the absolute bill of sale was acknowledged by Hammons to the plaintiff, without any condition, and the slaves delivered up to him. It was proved that before this acknowledgment by Hammons, Hopkins the plaintiff, had paid what Hammons admitted was a satisfactory price for the slaves. Immediately after the slaves were delivered to the plaintiff, and the bill of sale was acknowledged, Hammons removed from the State of Tennessee, where all the parties resided, and where the plaintiff still lives, to this State. That several months afterwards, Hammons returned to Tennessee, and secretly took the slaves from a plantation of the plaintiff's, upon which they were, under the control of an overseer, and conveyed them to this State; after which, two judgments were rendered against him, upon which executions were issued, and under which the slaves were sold; and under which sale the de-

fendant claims to hold. It was proved that when Hammond was charged with stealing the slaves, for having taken them from the possession of the plaintiff, as above stated, that he said he felt no danger from that, as the plaintiff, when they settled, had neglected to take up the *equity of redemption*, which he still held of the slaves.

The Court below instructed the jury, that under the evidence, the plaintiff was only a mortgagee of the slaves, and that the action of *detinue* did not lie to recover them, without a foreclosure of the mortgage; a verdict was, under these instructions, found for the defendant and the case is brought here by writ of error.

The Court below erred in both of the instructions given.

On the first point, the jury were the proper tribunal to decide as to the character of the plaintiff's title. Whether it was a mortgage, or an absolute sale, was a question of fact, deducible from the evidence produced, which the Court should have left to the jury.

As to the second instruction, there can be no doubt but that *detinue* does lie to recover personal property mortgaged, after the time for the redemption of the mortgage has expired. By the mortgage, the legal estate, as between the mortgagor and mortgagee, is vested in the latter, and he has the right to recover the possession of the property, for the purpose of subjecting it to the payment of his debt, and he may proceed either at law or by bill in equity.*

* 4 Kent, 154, 155, 164.

* Let the judgment be reversed, and the cause remanded.

2p 436
105 399

BULLOCK *versus* WILSON.

The duplicate receipt of the Receiver of public monies (on an entry of public lands) is, before the issuance of the patent thereon, sufficient evidence of title to authorise the *bona fide* holder of the same, to maintain the action of trespass to try title.

Every water course in this State, suited to the ordinary purposes of navigation, whether it ebbs and flows, or not, (where the government has not expressly granted any part of the bed thereof, or computed it in the quantity granted) is a public highway; and the owner of lands bounded by any such navigable stream, can assert no private right of soil to the bed of the river beyond the low water mark.

Semble:—The authority, under an act of the Legislature to erect a mill on such water course, must be exercised with reference to the rule, *sic utere tuo, ut alienum non ledas*..

Trespass to try title in the Circuit Court of Shelby, by Wilson against Bullock.

The action was brought to recover possession of a fraction of land, and the appurtenances, bounded by the Coosa river. On the trial below, a verdict was rendered in favor of the plaintiff, and on certain exceptions to the opinions of the Court, the defendant assigned errors here.

It appeared from the record, that Wilson had entered the fraction of land, forming the ground of action; and now claimed as appurtenant thereto, a certain mill, before that time erected in the bed of the river, opposite the fraction, by one Sawyer, under whom the defendant held.

It was urged, on the part of the plaintiff, that having become the owner of the land on the river, he took part of the bed of the river; and so was entitled to the mill, because, that being included between the North and South lines of his survey, attached to his grant. But it was said for the defendant, that Sawyer, under whom defendant held, had erected the

mill under the authority of an act of the Legislature, and the subsequent entry of the land by the plaintiff was subject to the privilege: also, that this being a navigable river, the plaintiff could not claim soil beyond the high water mark.

It was assigned for error in this Court, among other grounds,

1st. That the Court permitted the plaintiff to give to the jury, as his only evidence of title, the duplicate receipt of the receiver of public monies in the land office.

2d. That the Court charged the jury, that if they were satisfied from the testimony, that the mill attached in any manner to the land included in plaintiff's grant, it was appurtenant to his premises, and therein included.

WILSON, for Plaintiff in error.—The mill, in regard to which there is a contest, belongs, as we contend, to the body of the river. The Court instructed the jury, that if the mill was in any manner attached to the bank, the owner of the land was entitled to it. This was a navigable stream. The limits of a navigable stream extend to high water mark. The lines of fractional sections have not the power of locomotion—or rather of expansion and contraction, to conform themselves to the state of the water. The owner of the mill derives his right from the State. The proof in this case shews, that even at low water mark, the water ran round and on the out side of the foundation timbers of the mill. According to the civil law, the limits of a navigable stream extended out to the extent of the highest freshets: according to our law they extend to *ordinary high water mark*.—See 2 *Johnson*, 362.

The Court seems to have departed from the maxim of the Common Law, that the man who owns land owns all that is above and below, within the limits of his lines. The doctrine of the Court seems to be, that he owns all that is attached to his lines. This is extending the rule laterally instead of perpendicularly. In this new sense, I trust, it will not be recognised as law.

The certificate in this case is not one of those referred to in the act of Assembly, making certificates evidence. There was not, therefore, such evidence of title as would sustain judgment.

PECK, *contra*.—The certificate is such an one as entitles the party to a patent: it is therefore such evidence of title as will sustain the action.

Bullock built his mill abutting against the bank. The Common Law rule is, that there is no space between the land and the water.—6 *Coven*, 544. And we find it laid down as Common Law in *Coven*, that the owners of the land own to the thread or centre of the river. This is true limit for land holders in streams not navigable; and navigable streams, according to the Common Law, are not such as the Coosa river, but streams where the tide ebbs and flows. In navigable streams of this kind, the limits of land holders extend to low water mark, so that there is still no land between the land holder and the government, whose authority extends over the water. The Court is referred to the Kentucky and Ohio case, where the contest related to an island in the Ohio river.—5 *Wheaton*, 325.

What is meant in our laws by declaring a stream a public highway. It does not relate to the bed of the stream, but to the right to float over it on the wa-

ter: it is a peculiar kind of right of way. The bed of the river still belongs to the land owners on each side, to the middle or thread of such river. The Judge did not go as far as this. He charged the jury that the grant covered the land as far as there be land. The charge was clearly right. He also charged the jury that if the mill was attached to the bank, the owner of the land had a right to recover it as a tenement or appurtenance. This doctrine also may be well maintained, even if the right of the land holder does not extend to the thread of the stream.—When the United States government grants land on the bank of a river, it grants all the water privileges connected with it. These are often as important as the value of the soil. The reservation of the stream as a highway, is not a reservation belonging to the state: it is a reservation by the general government in behalf of the citizens of the United States; the State, therefore, has no such right in it as would authorise it to grant to any one the privilege of erecting a mill on the bed of the river.

WILSON, in reply.—If the doctrine here contended for be true, it might be important to know whether the action was brought in the winter or in the summer. This doctrine makes the line fluctuating. If a part of the mill overhangs the land, damages might be recovered for such overhanging; but not the value of the mill which was founded in the bed of the river.

Our lands in this State stand on a different footing from those in other States in regard to the rivers on which they border. The navigable streams are made public highways, and they do not belong to the land owners upon their banks. The State, although

she may not obstruct the navigation ; yet in virtue of eminent domain, she may use or grant the bed for any other purpose. She possesses all the authority not granted away. Land owners only border on the bank, and the State is only restrained as to the navigation. The mill was erected under an express grant from the Legislature. Can the entry by an individual of the adjoining land, enable the enterer to nullify the act of Assembly establishing the mill? Can he deprive the mill owner of the privilege that he had under the legislative grant?

By Mr. Chief Justice SAFFOLD:

The action was *trespass* to try titles, and recover damages, instituted by the defendant in error, pursuant to the statute, in lieu of the action of ejectment, &c. The land in dispute, as described in the declaration, is the south east fraction of section number seven, in township twenty one, of range two, east, containing one hundred and forty five acres, in the county of Shelby. The trial was had on the general issue. The matters assigned for errors grew out of a bill of exceptions taken on the trial by Bullock the defendant below, against whom a verdict and judgment were had for the premises; also, for damages.

The first point of exception is, that the Court sanctioned an amendment of the declaration, made between the time of ordering a *non-suit*, and *reinstating* the cause, without due notice to the defendant below, and formal leave of the Court. The Court appears to have ruled that the leave was sufficiently implied by the order setting aside the *non-suit*, on the affidavit on which it was founded.

As to this objection, it is sufficient to say, the allowance of amendments, is generally within the dis-

cretion of the Court, and as the Circuit Court recognised the authority for this amendment, the allowance of it is not subject to revision in error.

It further appears, that after the cause was put to the jury, the plaintiff below offered as his only evidence of title, a receipt (purporting to be in duplicate) in the usual form under the cash system of disposing of the public lands, given by the receiver of public monies of the land district, to James Wilson of Bibb county, for the sum of one hundred and eighty one dollars and twenty five cents, expressing to be in full for the fraction of land described in the declaration. To the introduction of which, as evidence of title, the defendant objected, but the objection was overruled.

In admitting this receipt as evidence, the Court is also charged to have erred. The objection is understood to have been made with reference alone to the *grade* of interest or title indicated by the paper, without questioning its *genuineness*; and this in the absence of any evidence of an adverse title. I consider it unnecessary to enter into an elaborate investigation of the principles of law applicable to this point; they are too well settled to require it. By the laws of the United States, the legal and *bona fide* holder of a receipt of this kind, is indefeasibly entitled to a patent for the same. Nothing more is necessary on his part to secure it. He already has a legal right—the receipt and the law, imperatively command the issuance of the patent as the complete evidence of the title. Until it shall have issued, the receipt is the best evidence of the right which the case admits of. This receipt is fully within the equity of the statute of 1812,* which recognises all certificates issued pursuant to any act of Congress, upon any warrant or or-
*Aik. Dig. 283.

der of survey, or to any donation, or pre-emption claimants of lands, as vesting in the holders "a full, complete and legal title," so far as to enable them to maintain any action thereon; and constitutes the same evidence thereof in Courts of justice. So far as there is any difference in the character of the evidence, or grade of title, a receipt of this kind is the more conclusive. But I do not consider receipts of this nature as requiring the aid of any statute. Upon the principles of the Common Law, they must be regarded as evidence of a grade of title which at least confers the right of possession, and this alone is sufficient in this action. But it is more: it is nothing less than inchoate evidence of an absolute title. Various decisions of this and other Courts, (*De la Croix vs. Chamberlain*,*) sustain this principle in terms or by analogy.—(See *Hallett vs. Eslava*,¹ *Lewis vs. Goquette*,² *Heirs of Rider vs. Innerarity*.)³ It was further objected by Bullock as defendant below, that the county surveyor was admitted as a witness for the plaintiff, and his evidence deemed *competent* by the Court, to ascertain the boundaries of the land in question. He swore that by tracing various lines by the marked trees, he ascertained the north west corner of the fraction, which was not marked; he then ran due south on both the sectional and township lines to the south west corner, which he ascertained by taking the bearings and distances; that then he ran the south line to the south east corner, but found no marked corners. From this latter point he ascertained, by setting his compass, and observations taken, that a line due north would strike the Coosa river below the mill: that he then retraced his line half a mile west, thence run due north half a mile, thence east to the river above the mill; and that in this way he ascertained the mill to be between

*12Wheat.599

2 Stewart115

3 In this Court.

the north and south boundaries of the plaintiff's fraction, and that opposite and for some distance above and below the mill, the fraction was bounded on the east by the river.

On this point it is considered sufficient to say, the character of the evidence was equal to any that the case would admit of, and was therefore competent.

Another feature in the case is, that Sawyer, under whom Bullock derived his title to the mill, had erected the same in the river, under the authority of an act of the General Assembly of the State; that this was a considerable time before Wilson became the purchaser of the fraction opposite; that the mill stood in the bed of the river; except that a little of the bank had been cut away, to make room for the north and south mud sills to be laid in it on a level with the bed of the river; that the west sill, or streamer being laid upon these sills, the current of the river ran around them, between them and the bank; that the bluff of the river was nearly perpendicular, so as to confine the water, except in extraordinary freshets; that about five feet of the upper frame of the mill-house projected over the top of the bluff, but without touching it; and that the puncheons passing from the mill door down to the bluff, were about twelve feet long. This invasion upon the land, or use of the bluff, appears to be the true grievance complained of.

In this state of the evidence, the Court being requested to instruct the jury on the several points of law arising upon the facts, and having refused some and given others, the following additional questions are presented for our consideration, as embracing all the remaining points of the case.

I. Admitting Wilson's title to the fraction bounded on the east by the Coosa river, what was the extent of his right or boundary on the margin of the river ; does he own all the naked land to the water mark, whether high or low, as was the opinion of the Circuit Judge?

II. Was it erroneous to instruct the jury, that, if the mill was in any manner attached to the plaintiff's bank, it was an appurtenant to the premises ; and included in his grant ; also that the plaintiff was entitled to recover damages for the use of it? These latter instructions were given.

III. Was the Circuit Court correct in refusing instructions that the verdict should except the mill out of the land if the latter were found for the plaintiff, and not the former also?

IV. Did the Court err in refusing instructions, that if the mill had been previously erected, abutting on the bank, under the authority of the State law, and this known to Wilson when he entered the land; he entered subject to the nuisance, if any, and was remediless?

1. The fact may be assumed, indeed does not appear to have been contested on the trial, that the Coosa river at the point in question, is a fresh water, navigable stream. Nor do I understand the principle to be contested, that by the existing laws of the government all such streams are recognised as common or *public highways*. The act of Congress of 1803, "Regulating the grants of lands, and providing for the disposal of the lands of the United States, south of the State of Tennessee," declares, that "all navigable rivers within the territories of the United States south of the State of Tennessee, shall be deemed to be and remain public highways." The subsequent

act of 1819, continued this provision under the State government, with the further stipulation; that all such waters shall remain free to the citizens of the State and of the United States, without any tax, duty, impost, or toll therefor, imposed by the State.* To these regulations, the people of the State, by their representatives, in Convention assembled, have given their assent and confirmation.^b

*Aik. Dig. 441

^bOrdin'ce 1819

The Legislature of the State has also declared that all water courses reported to be navigable, by the surveyor of the United States, employed in surveying lands in this State, shall be, and remain free and open.^c

^cAik. Dig. 442

According to the laws and practice of the United States government, relating to the surveys and sale of the public domain, the Coosa, as well as other similar water courses, is virtually excepted from all private grants. The lines of the survey stop at the margin of the river, by which means, fractions (as in the case before us) are created; and the purchasers of such are only charged for the true quantity of land, the bed of the river being excluded. In respect to grants of lands bounded by water courses, where there is no statute regulation on the subject, or express exception in the grant, intricate and highly interesting questions may arise as to the extent of the proprietor's right on the margin. In such cases, the character of the water, whether the sea, a navigable river where the tide ebbs and flows, a fresh water navigable stream, or one not navigable, is material to be considered in determining the extent of the grant.

There has been much litigation, whether the right extends to the high, or low, or the ordinary water mark, or to the centre, (often called the thread) of the

river. Our chief concern at present, is with a navigable river, where the tide does not ebb and flow.

- *6 Cowen, 518. To the case of *Jennings, ex parte*,^a the Reporter has appended a note, in which are collated most of the authorities on this subject. A brief notice of this, instead of the original cases, will suffice on the present occasion. It is there said to be settled by the Common Law,^b "that where a man's land *abuts* or *adjoins* to any river above tide water, he owns the river to the centre of the stream. That as long ago as 1805, in *Palmer vs. Mulligan*,^c it appearing that the defendant owned the shore of the *Hudson* as low down as still water, this being above tide water, *Thompson*, Justice, and *Kent*, Chief Justice, applied to this case the doctrine, (which had been held by Lord *Hale*,) that his ownership extended to the centre of that great river; and the latter then hinted at what has since been established, that if a State will bound a grantee upon a river not navigable, he shall hold to the centre, *unless there be an exception of the river in the grant*. In *Adams vs. Pease*,^d the plaintiff owned a large farm bounded east on *Connecticut river*, above the flowing of the tide; but where it was large and passable for flat bottomed boats of thirty tons burthen; and some times, vessels built above had been floated down; yet it was held, that a boundary, in terms, *on the river* carried the plaintiff's ownership of the river to its centre. The rule is there laid down by *Swift*, Chief Justice, that the *adjoining proprietors* have this right. The doctrine of this latter case appears to have been approved in its full extent by the *Supreme Court of New-York*, in *20 Johns. 91. *Hooker vs. Cummings*,^e where it was applied to the *Salmon river*, which empties into *Lake Ontario*.—*Spencer*, Chief Justice, in delivering the opinion of

the Court, said, "If the soil *on both sides* be owned by an individual, he has the sole and exclusive right; but if there be different proprietors on each side, they own their respective sides—*ad filum medium aquæ*. The Court then also approved what *Kent*, Chief Justice, said in *Palmer vs. Mulligan*, that the *Hudson* was private property down to *still water*. They also show that cases holding the contrary in *Pennsylvania*, are founded on a repudiation of the Common Law.^a

^a 17 John. 209,
210, &c.
^b 1 Halst. N. J.
Rep. 1.

In the case of *Arnold vs. Mundy*,^b the plaintiff's land *ran to*, or was bounded *on a river*, where the tide did ebb and flow; and he, and those under whom he claimed, had staked off, and planted a bed of *oysters*, some of which the defendant had taken away; for which the action was brought. On a motion for a *non-suit*, the Judge remarked, "that a grant of land to a subject or citizen, *bounded on a fresh water stream, or river*, where the tide neither ebbs or flows, extends to the middle of the channel of the river; but that a grant bounded on a *navigable river*, or other water, where the tide does ebb or flow, extends to the edge of the water only, that is to say, (in the language of the opinion before us,) "to high water mark, when the tide is high, and to low water mark, when the tide is low; but it extends no farther." The plaintiff was there *non-suited* upon this distinction. On a motion to set aside the *non-suit*, the *Supreme Court*, after full investigation, confirmed the distinction and refused the motion. The principle which is considered to have been established by that Court is, that "a grant of land bounded upon a fresh water stream or river, where the tide neither ebbs or flows, extends *ad filum aquæ*," but a grant bounded upon a navigable river extends to the edge of the water only.

6Mass. R. 438
439.

From the cases referred to, it will be observed, that those Courts, proceeding on the Common Law, regard the *ebbing and flowing* of the water, or either, as the criterion, whether the stream or river be navigable or not; they also shew that fresh water streams were not put on the footing of such. This principle is farther illustrated by the case of *Storer vs. Freeman*,* where Chief Justice *Parsons*, remarked, that "by the Common Law of *England*, which our ancestors brought with them, claiming it as their birth-right, the owner of land bounded on a fresh water river, owned the land to 'the centre of the channel of the river, as of common right; but if his land was bounded on the sea, or an arm of the sea, where the tide ebbed and flowed, he could not by such boundary, hold any land below the ordinary low water mark, for all the land below belonged of common right, to the King."

It is very obvious, however, that, with us, the question does not depend on the tide, or *fresh water*; that if the river has been expressly recognised as a public highway by the Federal and State Governments; or even if it be of sufficient width and depth, and suited to the ordinary purposes of navigation, and the Government has not expressly granted any part of the bed, or computed it in the quantity granted, which implies an exception, as in case of navigable water, the stream is thereby constituted a public highway, and no individual can assert any private right of soil in the bed beyond the low water mark. His claim could have no better foundation than that in the case of the *oyster bed* planted in the tide water, both places being alike reserved for public use. That this is the true character and proper view to be taken of the Coosa River, has I think been sufficiently

shewn. Therefore on this point there was no error in the instructions given below.

2. The second point involves the same principle, so that the remarks made upon the first are also applicable to this. It results from what has been said that Wilson could not sustain his title to a mill erected by himself in the bed of the river beyond low water mark. If he could not otherwise, the circumstance of his having inserted the mudsills, or any other part of the house, or dam, into the bank, so as to attach the mill to his soil, would not improve his title below the mark. Then it follows irresistibly that the fact of another having done the work can not extend his title. In either case the law could only recognise his title to so much of the building or works as came within his line. Therefore in this case the plaintiff below could have had a right to recover only so much of the mudsills, or other parts of the mill building, or appurtenances, as were actually situated within his boundary, fixing it at the *natural* low water mark. Nor could he recover these otherwise than as appurtenances to the land on which they rest, and which must pass with it in the restitution. Hence the conclusion results, that the Circuit Court erred in the instructions, that if the mill was in any manner attached to the plaintiff's bank, it was an appurtenant to his premises and included in his grant; also in ruling, that the plaintiff was entitled to recover damages for the use of it.

3. The third point is embraced and disposed of by the preceding views. It was unnecessary that the verdict should expressly except the mill.

4. The last point, involving the effect of the Legislative grant to Sawyer, under whom Bullock claims, was not intended to present any question as respects

its intrinsic validity in reference to the public. Such an enquiry would have been irrelevant to the case. The question was whether, if the mill had been erected under the authority of the act, prior to the plaintiff's purchase of the land, and he entered with a knowledge of this fact, he took subject to the nuisance, if any. On this point it is sufficient to say, the act can have no constitutional effect to deteriorate the value of the public domain, or any title or interest which an individual may at any time, either before or afterwards, have legally acquired in the same. To avoid a conflict of grants, the Legislature may be presumed to have intended no such effect. The legal view of the subject is conceived to be this, that any one intending to avail himself of the privileges contemplated by the act, must observe the maxim, *sic utere tuo, ut alienum non lædas*; and if he proceed without securing the adjacent lands, he must take upon himself the responsibility of the act, to all persons to whom injury may accrue from it. So that on this question the Court below was correct.

But on the second point, relating to the effect of attaching the mill house to the bank, the judgment below must be reversed and the cause remanded.

MOORE *versus* PATTON, DONEGAN & CO.

Interest is recoverable on an open account for goods sold and delivered, where, by express stipulation, the account is to be considered as due at a particular day.

Interest held recoverable on an open account, on the common counts in *assumpsit*, where the defendant agreed to pay interest, and promised to give bills in discharge of the debt.

Patton, Donegan & Co. commenced an action of *assumpsit* against Moore, the plaintiff in error, in Madison Circuit Court; and declared for goods, wares and merchandise, before that time sold and delivered to the defendant, at his special instance and request. The accounts of the plaintiffs, were for sales of goods for several years; and the question raised in the Court below, was, whether under the facts, interest was recoverable on the common counts. It was in evidence, that by express stipulation, the accounts were considered to be due, on the first day of January next after they were severally incurred; and that the defendant had agreed to discharge them by a bill.

The Court left it to the discretion of the jury to give interest or not, and they, having rendered a verdict for the plaintiffs, for debt and interest; the defendant took a writ of error.

HOPKINS, for Plaintiff in error—cited in argument the following authorities:—*Chit. Con.* 195—2 *New R.* 205,—12 *East* 419,—15 *East* 229,—5 *Espin. R.* 114,—3 *Camp.* 259,—2 *Stark. Ev.* 787,—5 *Coven.* 587,—2 *Wendell R.* 501,—9 *Barn. & Cres.* 37.

ORMOND, *contra*.

By Mr. Justice HITCHCOCK :

This was an action of assumpsit by the defendants in error against the plaintiffs for goods, wares and merchandise sold and delivered: the declaration contains the usual common counts, to which the defendant pleaded non assumpsit.

At the trial below, the plaintiffs proved the correctness of four several accounts, ending on the first of January 1829, 1830, 1831 and 1832, in each year, for goods sold and delivered to the defendant in each of the preceding years, and also proved that by an understanding with the defendant, each of the accounts was due on the first day of January next after the year in which the accounts were made: that the accounts for 1828 and 1829, were placed in the defendants hands in the spring of 1830, and that for 1830, in the spring of 1831; that soon after the account for 1831 was due, an attempt was made to collect them, when the defendant objected to pay interest upon any of them. It was finally agreed between them, that no interest should be charged for 1831, if the defendant would pay the interest on the other three, by a bill on New Orleans, which he promised to draw in some short time. The defendant failed to draw the bill as he had promised, and this suit was brought.

The defendant moved the Court to instruct the jury, that the plaintiffs were not entitled to interest on the accounts; which instruction the Court refused to give, but instructed the jury that they might in their discretion allow the plaintiffs interest on each of the accounts, from the time the evidence showed they became due, or refuse it: to this instruction, exception is taken, and the case has been brought here by writ of error; and the above instruction of the Court is assigned for error.

There is great contrariety on the subject of allowing interest, both in England and in this country; and the decisions cannot be reconciled as a general rule. It is laid down,^a that interest is recoverable, in addition to the principal sum, upon an express promise, or where a contract may be implied from circumstances, but not otherwise; such as the particular mode of dealing adopted by the parties, or the usage of trade, in which they dealt. ^{a 2 Starkie, 419.}

In the case of *Slack vs. Lowell*,^b Chief Justice Mansfield said, that he could never reconcile it to reason that a man who delays payment of money which he owes, should not pay interest for it; but certainly that is not the law, nor therefore understand, why interest should not be paid for goods sold and not paid for, and in that case the court refused to set aside a verdict where interest had been allowed on a sale of goods, which were to be paid for by bills, although there was only a count for goods sold, and no count for not furnishing the bills. ^{b 3 Taunton, 158.}

In the case of *Gordon vs. Swan*,^c interest was allowed as part of the estimated value of the goods upon the common counts for goods sold. In the case of *Blaney vs. Hendrick*,^d interest was allowed on an account stated, from the day on which it was stated; but it was decided that no interest could be recovered in respect of money owing for goods sold and delivered. ^{c 12 East, 419. d 3 Wils. 205.}

In the case of *Mountford vs. Willes*,^e interest was allowed for goods sold and delivered, a time being limited by the agreement, which was in writing, for the payment. ^{e 2 B & P. 337.}

In the case of *Calton v. Bragg*,^f Bayley Justice, held that as interest was not by law due for money lent, to be repaid either on demand, or at a given time, it fol- ^{f 15 East, 224.}

lowed that interest was not due for money payable at a certain time after an event.

*13 East, 98. In the case of *Marshall vs. Poole*,^a it was held that interest, subsequent to the day of payment, might be considered as part of the stipulated price of the goods.

^bDouglas, 376. In the case of *Eddowes vs. Hopkins*,^b Lord Mansfield held, that in cases of long delay and under vexatious and oppressive circumstances, juries, in their discretion might allow interest.

Many more cases might be cited to shew, that there is no settled rule applicable to all cases : in some cases it has been allowed as incident to the contract, in others, as a breach of the contract, or as consequential damage. It is a rule founded in justice, that when a man has been kept out of his money, he should be allowed a reasonable compensation for its use : upon this principle it is, no doubt, that the Courts in this State have allowed juries, in actions of assumpsit, on the common counts, for goods sold, when no period of credit was proved, to give interest from the date of the writ.

In the case before us, the time for payment was fixed ; the creditor had a right to expect payment at the expiration of that time. The sums actually due were not, it is true, ascertained and assented to by the defendant on the days they respectively fell due ; but the accounts were presented afterwards, and no objections were made to them. From the nature of the case, the precise amount of the debt to be due on the first of January in each year could not be ascertained when the contract was made. The defendant wishing to purchase goods, from time to time during the year, stipulates for a credit to the first of January in each year, and agrees to pay, at that time, what shall

then be due. If he delays payment, he is liable to be sued, and when the amount is proved, can it be "reconciled to reason" that he should not pay interest for the detention of the plaintiffs debt: if so, the defendant can avoid interest by refusing to acknowledge the account. The defendant did here, however, acknowledge these accounts and promised to pay interest on three of them by giving a bill on New Orleans. But it is contended that interest cannot be recovered, because the action is not brought for a breach of that promise.

The original contract was not extinguished by that promise; the delay of payment was a damage to the plaintiffs: the rate which the law has allowed for the use of money, was the proper measure of damage for this delay, and whether it be viewed as originating immediately in the contract, or be taken as due for a breach of it, or as growing out of the promise, we see no reason why it should not be allowed on the common counts.

We therefore think the Court did not err in leaving it to the discretion of the jury whether to give interest or not.

Let the judgment be affirmed.

Mr. Justice THORNTON not sitting.

WOODCOCK *versus* CAMPBELL.

Porter.
2p 456
114 104

In order to charge the assignor of a bond, (on a contract of indorsement made prior to the passage of the act of 1832, subjecting bonds, payable in Bank, to the Law Merchant,) held, not necessary that demand should have been made at the Bank where the instrument was made payable.

The acts of 1828 '29, requiring the indorsee of a paper to sue the maker thereof to the first Court after due, &c. do not embrace a case, where the maker removes beyond the jurisdiction of the Courts of this State, and so remains during the period when he might be legally sued.

In such case, it is not necessary to charge the indorser, that the party should go beyond the State to find the maker.

Assumpsit by Campbell, in the Circuit Court of Lauderdale, on an instrument in writing, payable at the United States Branch Bank at Nashville, on the twenty third of April, 1832. The case came up on exceptions to the charge of the Court below.

The defendant was first indorser of the paper sued on, which was drawn in his favor by one Boggs. It was attempted to be defended on the ground, that no demand had been made at the Bank, nor had suit been brought against Boggs, as required in the case of indorsers; for it was insisted, that this case came within the statutes of 1828—'9: but the Court held, and so charged the jury, that if Boggs, the maker, had removed out of the State, before the bond became due, and had so continued; the plaintiff was entitled to judgment, even though no demand had been made at the Bank for payment. And on this decision judgment went for the plaintiff, and the case was brought here for revision.

ANDERSON, for Plaintiff in error, cited 11 *Wheat.* 175; 1 *Stewart*, 245; *Aik. Dig.* 330; 2 *Mason's R.* 151, 167; 7 *Bac. Ab.* 189; 5 *Fonb.* 669.

HOPKINS, *contra*.—5 *East*, 129 ; 6 *Cranch*, 221 ; 11 *Johns.* 142 ; 3 *Mass. R.* 79 ; 3 *ibidem*, 81 ; *Aik. Dig.* 321.

By Mr. Justice THORNTON :

This was an action of assumpsit, brought by Campbell, the defendant in error, against Woodcock, as endorser of a writing obligatory, executed on the 23d of April, 1831, by one George Boggs, jr, whereby he promised to pay the amount therein named, to the said Woodcock, twelve months after date, at the Office of Discount and Deposit of the Bank United States at Nashville ; who indorsed the same to one Donahoo, who endorsed to the plaintiff below. The bill of exceptions gives all the testimony, and shews that there was none of any law of Tennessee. The only questions raised by the assignment of errors then, in this Court, which we deem it necessary to consider, arise out of the charge which was given to the jury by the Court trying the case. That charge was, “that if they believed, that Boggs had removed out of the State, before the bond became due, and continued out of the State up to the present time, (*July Term*, 1833,) the jury might find for the plaintiff without proof that a demand of payment had been made at the Bank in Nashville at any time.” Before I proceed to consider the propriety of this charge, I will make some preliminary observations on the endorsement, the bond, and the acts of our Legislature touching the same, which will render more intelligible the views advanced on the main points. Every endorsement is a substantive contract ; and every act of legislation, affecting the extent of the liability of assigners or endorsers, affects the very rights of parties, and is of the essence of such contract, bearing

no resemblance to such acts of the Legislature, as only purpose to regulate the remedy, or mode of enforcing that liability. The laws then, in force in the country, where the endorsement is made, ascertain the liability of an endorser. That liability, differs with us according to the instrument, which is endorsed or assigned. If it be a bill of exchange, the law merchant governs, if not, but a bond for example, then that liability is such as the statute law in force at the time of the endorsement, imposes. It is important then, to ascertain in every case, the true nature of the instrument endorsed, as the liability varies, with that character. As to the nature of the instrument endorsed in this case, we are constrained to consider it as a bond, whose endorsement imposed no other obligation, than is pointed out in the acts of 1828 and 1829. The act of 1832, passed in December of that year, which makes bonds payable in Bank, subject to the law merchant, can only affect contracts entered into after its passage. Hence I conclude, that this bond is not subject to the law merchant, and of course that the contract of endorsement made in this State, is such as it is constituted, by the acts of 1828 and 1829. In the light of this view of the contract declared on, I will proceed to consider the charge given by the Court as above set forth, which as I apprehend it, contains two legal propositions. 1st. That no demand was necessary to be made at Nashville of payment, by the plaintiff below, before he could assert the liability of the assignor to him. And 2nd, That the removal of the maker or obligor, Boggs, before the bond became due, and his continued absence out of the jurisdiction of the Courts of the State, dispensed with the necessity of suit at the first Court, and a return of

nulla bona to a *fi fa* upon a judgment against him in the county of his residence, as required by the above mentioned acts of our Legislature.

In considering the first proposition above stated, care must be taken not to confound two things which it is the object of these acts of the Legislature to separate and distinguish; that is, the liability of the assignor of a bond, and the liability of the endorser of paper, subjected to the dominion of the *lex mercatoria*. It may be true, that, if this instrument were considered as subject to the law merchant, the liability of the endorser could only be fixed, by proof of demand made at the Bank in Nashville; and yet it would by no means follow that such demand would be necessary to charge the present defendant, who is not the endorser of a mercantile paper. However it might be if this paper were mercantile, I feel confident that no demand was necessary in this case to charge the defendant below. The assignor was bound to do no more than the terms of the instrument assigned, required him to do, in order to make the obligor liable to him, in an action, which the statutes required to be brought, before the liability of the defendant below, as assignor, would attach. If the terms of this bond, according to law, required a demand at the place specified, before any suit could be brought against Boggs, the obligor, then, I would hold, that such demand should have been made; for the acts of 1828—'9, requiring suit to be brought, first against the obligor, imply of course, that whatever is necessary to give such an action against him, should be done. If a demand were necessary to fix him, it would be obligatory upon the assignee to make it. But the necessity of making demand at a particular place, and giving notice to the endorser of a mercan-

tile paper payable at such particular place, proceeds on a ground peculiarly applicable to that class of securities. A demand must be made, not with the sole purpose of making the acceptor, or maker of a note, or bond, liable, where these latter instruments are made mercantile, for it is equally requisite, where he would be liable without it; but it must be done in order to make the endorser liable. Now the policy of the acts of 1828—9, was to relieve the assignees of bonds, and other instruments, not mercantile, from this diligence, as a means of fixing the liability of assignors; and place that liability upon the grounds of suit brought, &c., as therein prescribed. Still however, if such suit could only be brought against the maker, according to the terms of the assigned instrument, after a demand made, such demand it seems to me, would be requisite. The inquiry then arises, was such demand necessary in this case to fix the liability of the obligor. We hold the doctrine that it is not necessary, upon the authority of 11 *Wheat.* 175—17 *John.* 248; and of this Court, in the case of *Irvine, admr. vs. Withers*—1 *Stew.* 234.

As to the 2d proposition above stated, as contained in the charge excepted to, it is one which has never been submitted, heretofore, to this Court. The correctness of the charge of the Court which affirmed this proposition, depends on the proper construction of the acts of 1828—9, which we have already declared to regulate the contract of assignment now before us. These acts declare substantially, that if the assignee fail to sue the maker or obligor to the first Court of the County, where he resides, the assignor shall be discharged from liability, unless suit be delayed by his consent &c. That when judgment shall be recovered against the maker or obligor,

and a writ of *fi. fa.* shall be returned no property found, the assignee may commence his action against the assignor, or endorser, on the assignment or indorsement, and the said return shall be sufficient evidence of the insolvency of the maker or obligor to authorise a recovery against him on his assignment, or endorsement. The whole course of our legislation on this subject, shews conclusively, that the liability of an assignor or indorser on his engagement as such, has ever been considered as founded on such considerations of legal and moral right, and so sanctioned by Common Law principles, as to be worthy of being put beyond the controversy, which has assailed it in other States of the Union. The first statute which authorised the assignment of bonds, and other instruments not assignable at Common Law, at the same time that it did so, attached to such endorsement, all the liability of the *lex mercatoria*. This continued to be the measure of responsibility, down to the year 1828, when, by an act, whose preamble is in the following words: "Whereas much injury has been done to the citizens of this state, by means of the uncertainty of the decisions of the Courts of this state, in relation to the proper time at which endorsers of bills, notes, bonds, &c., made negotiable by endorsement, by law, shall make demand of payment of the payers of such instruments, for remedy whereof"—this matter was regulated, according to the terms which I have already mentioned; the act of the following year being explanatory only. The effect of those acts was, it must be apparent, a very material change in the liability of endorsers and assignors of the instruments embraced in their provisions. But it cannot be admitted, that the intention of the legislature was to do more, than to provide against that mischief

which it asserted to exist, under the former law, and to remedy which, is declared to be the purpose of its new provisions. In lieu of demand and notice, which was the supposed source of that mischief of uncertainty, was substituted suit to the first Court against the maker or obligor, and the return of *nulla bona*, as evidence of his insolvency. But it would not be a fair construction to say, that the intention was, by this substitution, to require the new mode of fixing the liability, to be pursued in every case where the demand and notice, for which it was substituted, must before have been observed. The sensible effect of this latter legislation is, that instead of the demand and notice as heretofore, to charge an endorser, insolvency of the maker shall be established, by return of *nulla bona*, in a suit instituted to the first Court of the County where the maker resides. The very language of the enactment would imply, that this requirement of suit has reference to our own internal, judicial and geographical economy, and did not contemplate the intervention of foreign tribunals, where the maker has removed beyond our jurisdiction, before any suit could be brought, and continues abroad beyond the time, within which he is required to be sued. To put any other construction on the law, would be to infer, that the Legislature intended that a ground of claim, which is recognised as one of high moral, and legal obligation, should without any fault attributable to the owner of it, be jeopardised, or lost; for if suit be strictly required, removal even to unknown regions, would no more furnish an excuse, than into another State of the Union. By analogy to the decisions of those States, where suit is necessary to charge an indorser of this class of instruments, by *rule of decision*, as it is here, by express enactment,

I would conclude, that the case of removal, so as to render insolvency impracticable to be established by suit, in the State, as forming an exception. So I would consider, that the *ex parte*, and extraordinary process of attachment, would not be necessary in such case. The act, interpreted as above, with reference to our own jurisdiction only, is in its terms exclusive of this process, for it requires a suit in the county where the obligor resides, which of course is impossible, in case of removal from the State.

The views above taken, embrace every point in the assignment of errors.

Let the judgment be affirmed.

HARKINS, et. al. *versus* COALTER, et. al.

A deed to a *feme covert*, and the heirs of her body, implying the creation of an *estate tail* in personal property, vests in her such absolute estate, as will be subject to the disposal of the husband, and liable for his debts.

Equity will give effect to the terms of a deed, conveying property to a *feme covert* for her exclusive use, even where no *trustee* is nominated, and will regard the husband a trustee, so far as to enforce a compliance with the intentions of the donor. But the *intention* to create a trust estate for the wife must distinctly appear.

Where a deed of personal property, conveying the same to the wife, stipulated that the property was given for the *joint use, behoof and support of the husband and wife, and subject to their joint possession*; the Court held the deed not to create a separate and distinct estate for the wife, in exclusion of the husband's marital rights; but subject to his debts.

This was a bill in Chancery, filed in the Circuit Court of Lauderdale, by Coalter and wife, to enforce the terms of a deed.

From the bill, answer, and exhibits, it appeared that Coalter having intermarried with Rachel, the

daughter of one James Rhodes, and become embarrassed, the said Rhodes executed his deed of certain personal property to his daughter Rachel, which, as was contended in the bill, was intended for the sole use, benefit and behoof of the wife of complainant, and to secure her a livelihood free from, and uncontrolled by the debts and contracts of her husband; that afterwards, certain of the creditors of the said Coalter, having obtained judgment against him, sued out execution thereon, under which certain slaves, part of the property conveyed in said deed, had been sold by the sheriff to Harkins, one of the defendants to the bill. The Chancellor below, on a final hearing, rendered a decree in favor of the complainants, for two of the slaves, (one having died pending suit) and for their hire.

The question presented for the decision of the Court, on error, and on which was based the decree below, was the construction of the deed, and whether the estate thereby conveyed, vested such property in the wife as could not be subjected to the husband's debts. The deed, as appeared from the record, was in the following words :

“ Know all men by these Presents, that in consideration of the natural love and affection I bear to my daughter Rachel Rhodes, since given in marriage to, and now the wife of James Coalter, I give to said Rachel, otherwise Coalter, and to the heirs of her body by the said James Coalter begotten, if if they should have any; if they should have no children during the lives of her the said Rachel and James, then to have and to hold said property, to wit, one negro woman named Eady, supposed to be about twenty years of age, also a negro boy, her child, named Harris, aged about seventeen months;

HARKINS, et al. vs. COALTER, et al.

“ one bed, bedstead and furniture, twelve bed spreads
 “ and sheets, also five head of cattle, four head of
 “ sheep, one bureau, one table and candle-stand, one
 “ large spinning wheel, and one flax wheel, and the
 “ increase thereof, to the only proper use and behoof
 “ of the said Rachel and James, during their lives,
 “ and to remain in their joint use and possession for
 “ the use and support of the said Rachel and James,
 “ and none others, and for the use and support of such
 “ such child or children as they may have by virtue
 “ of and during their marriage. In testimony where-
 “ of, I have hereunto set my hand and seal, this 16th
 “ day of August, 1827.”

“ JAMES RHODES, (Seal.)”

“ Signed, sealed, in the presence of us.”

his

“ NEHEMIAH X SHARP,”

mark.

his

“ JOSHUA X RHODES.”

mark.

P. ANDERSON, for Plaintiff in error.—The intention here, seems to have been to create an estate tail. The operative words for that purpose are used. Estates tail are abolished by our law ; and this conveyance, by our statute, as well as by the Common Law, as to personal property, conveys a fee-simple title, or the highest estate that can be given. The title to the property was, therefore, complete in the husband. 4 Cruise, 236, marg.—Fonb. Eq. 338—Aikin's Digest, 95.

There could be no doubt on this subject, unless produced by the subsequent part of the deed. There is a subsequent provision, in the *habendum* to the

deed, that if there be no children, then there is to be a life estate to husband and wife; and then to add to the absurdity, this estate upon condition of *no children*, is attempted to be limited *to the children*. The estate attempted to be created in the *habendum* of the deed, is repugnant to that in the premises, and is therefore void. 4 *Cruise* 226, marg. 1—*Searg. & Rawl.* 374. This estate for life, is void for another reason: it was on condition of there being no children, and there were children. On this void estate for life, there could of course be no valid limitation. The words of the premises must therefore have their full effect. And yet there can be no ground on which to set up a use in behalf of the wife, but as a limitation to this void estate.

Courts will not easily admit a construction, that destroys the estate of the husband. He is a purchaser, who assumes high responsibility: it is only when it clearly appears, that what is given was given for the *separate use of the wife*, and that otherwise it would not have been given, that such construction will be admitted. 5 *Vesey* 518—3 *Vesey* 166. There are no words in this deed, construe it as you will, that creates a separate estate.

The husband had an interest in this property: by the words of the deed, it is for his benefit, as well as for the wife. He is in no way excluded. We are entitled to his interest. He ought to have been made a party. 1 *Johns. C. R.* 90. This omission of itself would be sufficient to reverse the case.

In regard to the husbands rights, see also *Chaucy's Rights of married women* 267, 269.

The parol testimony offered, ought to have been excluded. It went to explain the deed, and to attempt to throw light on certain dark parts of it. This was

inadmissible. 1 *Johns. C. R.* 231, 240—6 *Vesey* 396—*Fonb. Eq.* 312—2 *Vesey, sr.* 194—2 *Dess.* 115.

This deed, however, I contend was wholly inoperative. The property did not come to Coalter by the deed. The marriage took place in August. The deed was executed in September, and the negroes were delivered on the 28th of the ensuing February. No delivery accompanied the deed, it was therefore void. A promise to convey is not a conveyance. The slaves passed by the delivery, and not by the deed. 2 *Kent Com.* 354—18 *John.* 145—2 *Johns.* 52.

ORMOND, *contra.*—The delivery of the slaves, though subsequent to the date of the deed, was, I contend, sufficient. If the creditors of Rhodes had interposed between the date of the deed, and the delivery of the property, it might have been a different case. But in a case like this, the Court will infer that the delivery was in pursuance of the deed. If the *locus pœnitentiæ* did exist, (as the counsel insists,) it was not exercised.

The bill says, that a man in whom confidence was placed, was called on to write the deed. *Confidence* was never more *misplaced*. The deed is badly drawn. The *intention*, however, is the grand criterion in the construction of deeds. And where there is a *general* and a *particular* intent, Courts will sacrifice the latter, to effectuate the former. Language is the instrument of thought, imperfect with all persons, but most imperfect with the ignorant: and where Courts sit upon the construction of a contract, the object of inquiry is, not what was the particular language, if it be doubtful, but what did the parties intend to do by the contract. *Now Coalter was insolvent, as the bill shows: these debts were pressing him at the time of the*

making of this deed. Was this property intended by the father of the wife to go to these creditors of the husband? The answer must be in the negative; and this circumstance goes far to show, that this property was intended for the daughter. There was nothing immoral in the intention, nor in the transaction. The creditors of Coalter were not injured. The gift from Rhodes did not make their situation worse, and he was under no obligation to make it better.

Why was the deed made at all? This question is sufficient to settle the general intent of the grantor: it cannot be answered, but on the supposition of an intent to secure the property from the husband in his embarrassed circumstances. 4 *Cruise's Dig.* 205.

Particular words and phrases repugnant to the general intent, will be rejected.—3 *Atkins* 136—2 *Comp.* 600.

The question then arises, can a man make a provision for his daughter, where the husband is insolvent? Must she grovel in the dirt, despite the wish and ability of the parent. Our laws are not thus inhuman. 4 *Dess.* 447. See *Chauncy's Rights of married women* page 262, where it is laid down that a separate property may be granted to a wife for her support, and that of her children, without the creation of trustees. It will be sufficient if the property be given "to her sole and separate use" or "for the livelihood of the wife." The language of this deed, I conceive, goes as far as that; and there are other circumstances which establish the intent of the grantor.

The deed is so inartificially drawn, that it will not admit of that species of legal criticism to which the counsel wish to subject it. They speak of the *premises*, the *habendum* and the *tenendum*. Why, these

terms have no meaning when applied to such a deed as this. What the counsel calls the premises is mere recital, and no grant at all.

It is said, that the words "*heirs of her body*" convey an estate tail. It is true, they had in general that effect at Common Law; but there is no such estate here; and it is clear that the words were used by an ignorant man, who had no knowledge of their import. The words ought therefore (as they have frequently been) to be made to give way to the intent.

By Mr. Chief Justice SAFFOLD:

According to the view we take of the case, the following enquiries embrace the entire merits, and are decisive of the controversy.

1. What is the true and proper construction of the deed.

2. The consequence of the non-delivery of the property at the time the deed was delivered, and the subsequent delivery, under the circumstances of the case.

3. The legal effect of the conveyance in exempting the property from liability to Coalter's debts.

The deed is doubtless one of the most obscure and incongruous instruments, that could have passed from the hands of the merest tyro, in the scrivener's art. It is scarcely possible to analyze it, and if done, the parts are incompatible. But if the intention of the grant, can be satisfactorily ascertained, from the language employed, however vaguely, or inartificially expressed; it is the duty of the Court to construe and enforce it accordingly, if it be not in violation of any rule of law.

It is unnecessary to investigate minutely, the technical rules relative to the office of the *premises*, the

habendum, &c. noticed in argument; for these distinctions do not appear to have entered into the imagination of the grantor. Could we satisfactorily explore and extract the *intention*, this formality might be disregarded. The language of the deed is as follows :

“ Know all men by these presents, that in consideration of the natural love and affection I bear to my daughter Rachel Rhodes, since given in marriage to, and now the wife of James Coalter, I give to the said *Rachel, otherwise Coalter, and to the heirs of her body* by the said James Coalter begotten, *if they should have any* ; if they should have *no children* during the lives of the said Rachel and James, *then to have and to hold the said property*, to-wit, (here the negro woman and child, &c. are mentioned and described) *to the only proper use and behoof of the said Rachel and James during their lives, and to remain in their joint use and possession; for the use and support of the said Rachel and James, and none others, and for the use and support of such child and children as they may have by virtue of, and during their marriage.*” In testimony, &c.

Were I to attempt to extract the intention of the deed, from its language, by adding a few words which appear to have been omitted, expunging repetition, and by a slight transposition, I would read it thus: In consideration of the natural love, &c. to my daughter Rachel Rhodes, I give to her and to the heirs of her body, if any, by her present husband J. Coalter, a certain negro woman and child, &c. to have and to hold said property to the only proper use and behoof of the said Rachel and James, and any such issue, and for their joint use and support, during the lives of said Rachel and James. But if they

should have no such child or children, then said property to remain in the joint use and possession of the said Rachel and James, for the support of themselves, and none others.

Regarding this as a fair and just interpretation of the deed, the intention must have been, (in the event of a child or children, by the marriage, which has happened) to create an *estate tail* for the permanent benefit of the issue, unless it be otherwise explained and controlled by the latter provisions of the deed. It is contended, however, that such is the case; that the *habendum* limits and qualifies the *premisses*, so as to point out the wife, during her life at least, as the exclusive object of her father's bounty; and that the attendant circumstances, such as the known insolvency of the husband at the time, and the execution of a deed, instead of a mere delivery of the property, do (as was supposed by the *Chancellor* below,) greatly strengthen this conclusion.

But this argument is in opposition to the well founded objection, that such is not the office of the *habendum*, and in this case, can not be its effect; also, that J. Coalter, the husband, from the language of the deed, was no less the object of the grantor's bounty, than his wife; and that extrinsic circumstances can never be allowed to *contradict the expressions of the deed*. In construing the *habendum*, or latter directions of the deed, we should surely be doing violence to the expressions, to deny to the husband an interest in the property, equal to that of his wife. The least equivocal language used, is that which directs it "to the only proper use and behoof of the said Rachel and James during their lives, and to remain in their joint use and possession, for the joint use and support of said Rachel and James, and none others."

It is true that this is so declared on the contingency of no children, but if it be resorted to in aid of, or to explain the preceding direction, it can have no other effect than to evince the donor's intention to place the husband and wife on a perfect equality. This I take to be the only legal and reasonable construction.

* 2 Kent's C.
354—2 Johns.
R. 53—18 id.
145.

2. Respecting the time and manner of delivering the property, but little need be said. Admitting, as I am prepared to do, that to constitute a valid donation *inter vivos*, an actual delivery of the property, or some tantamount act, even where a deed has been executed, is necessary to bind the donor, and afford validity to the gift: yet, under the circumstances of this case, the objection of non-delivery does not appear sustainable. The fact, that the donor did not claim, or exercise the *locus pœnitentiæ*; on the contrary, that the property was delivered on the expiration of the hire of the one slave only, that could have been of any use; and this, without any objection to the terms of the deed by the donees—these are circumstances implying a consumation of the gift, according to the terms of the deed. It may also be remarked, that as the rights of the donors, creditors are not involved, and there is no objection to the conveyance for the want of registration, the necessity for a delivery of the property simultaneously with the deed, was not the same that it would otherwise have been. I therefore conclude, that this objection alone could not prevail against any limitation or restriction of the title or interest in the property, which may have been sufficiently prescribed by the terms of the deed.

3. The remaining branch of the case, relating to the legal effect of the conveyance as drawn, involves a highly interesting enquiry, and has been argued on

both sides, with zeal and ability commensurate to its importance. It is, however, necessarily conceded by the counsel, that so far as the deed discloses an intention to create, in the wife, and the heirs of her body, an estate in *fee tail*, the intention was in violation of the rules of law, and can not be sustained; that, even by the Common Law, such restrictions, or limitations were void in reference to *personal* property, such as this; and that by a statute, passed as early as 1812,* it was declared, that every estate in *lands or slaves*, which had been or might be created an estate in *fee tail*, should be an estate in *fee simple*, and be discharged of the conditions annexed by the Common Law, restraining alienation before the *donee* should have issue; so that the *donee* or person in whom the conditional fee vested, should have the same power over the estates, as if they were pure and absolute fees—with a *proviso* relating to lands only. Therefore, without farther enquiry on this point, the proposition may be adopted, that so far as the deed expresses an intention to create an *estate tail in Rachel Coalter, and the heirs of her body*, the legal effect was to vest in her an unqualified and absolute estate; and, she being a *feme covert*, the law, of course, immediately vested the same in her husband, subject to his disposal, and to all liability for his debts. The fact that the deed was executed in Tennessee, connected with the principle of law respecting the *lex loci contractu*, is not understood to be relied on in support of the entailment; for without enquiring into the law of that State, the circumstance of the donation not having been consummated there, or otherwise than by the subsequent *delivery* of the property, which took place in this State, is sufficient to subject it to our law. Whether the mere introduction of it into this State after a per-

* Aik. Dig. 95.

fect gift would produce the same effect, I need not now decide.

Then, unless the attendant circumstances, or the latter clauses of the deed, be sufficient to vary and control the preceding, and to constitute *a separate property in the wife alone, or in the wife and child*; there is nothing to exclude the husband's *marital* rights, and the slaves must stand subject to his disposal, and of course subject to his debts.

* Clancy's
Rights of mar-
ried women,
251. bk. 3 ch. 1

* Id. 257.

That any owner of property is competent, so to convey it, as to create a *separate* estate in a *feme covert*, for her exclusive use, is a well settled principle. And "when that intention is once ascertained to be, that the use is for the wife alone, and not for her husband, equity will give effect to it, without any regard to the legal maxim, that the husband is the head of the wife, and, therefore, all that she has belongs to him."^a It is also at the present day unimportant, whether, in a devise of real or personal property, to the separate use of a married woman, the limitation be to herself only, or to trustees for her; "as it is now settled, that if the limitation be to her only, for her own separate use, without the nomination of a trustee, although the Common Law vests her personal property in the husband, and the rents of her real property, in him, during her life, still equity will consider him as a trustee for his wife, and enforce a compliance with the intention of the donor." The trust estate must be very distinctly expressed, before the Court will establish it against the rights of the husband. "It seems, however, to be immaterial in what form of phrase a trust of that nature is described; technical language is not necessary, as all that is required is, that the intention of the gift should appear manifestly to be for the *wife's separate enjoy-*

ment." But it is farther declared, that "Such a claim on the part of a married woman, being against common right, the instrument under which it is made, must clearly speak the donor's intention to bar the husband, else it can not be allowed." Also, "that the strongest evidence of intended generosity, and of bounty towards the wife, will not be sufficient to give her a separate estate, unless, in addition, language be used by the donor clearly expressing the exclusion of the husband; or else directions be given with respect to the enjoyment of the gift, wholly incompatible with any dominion of the husband." I consider ^{*Clancy, book 2, 262.} this brief exposition of the principle, quite sufficient to shew, that neither the fact of the husband's insolvency at the time; of the gift having proceeded from the wife's father; nor the resort to a written conveyance, or all of them together, nor any other attendant circumstances, can have the effect to constitute an estate which is palpably irreconcilable with the express directions of the deed.

In this case it has been shewn, that the premises, or early clause of the deed, imported an estate *tail*, which in law, or equity can have no other effect than to create an absolute estate in the husband; also that the latter provisions constitute the husband no less an object of the donor's bounty or generosity, than the wife. The property is declared to be for their *joint use and behoof, and support*, and subject to their *joint possession*. Was any case cited in argument, where, by construction, so much violence was done to the language of the deed, as to maintain, that a clause expressly creating an estate for the *joint use and support of two*, was intended to create a *separate property for the sole use of one*?

The case which appeared to extend the principle

3 Atk. 399.

farther than any other, was that of *Darby vs. Darby*. There it was held by Lord *Hardwick*, that if an estate be given to a husband for the "livelihood" of his wife, this ought to be considered a trust for the use of the wife; for that the word *livelihood*, showed an intention in the giver that it should be to her sole and

* Clancy, 263, 264.

²Id. 263, noted

separate use.^b The authority of that case has since been denied.^c But admitting its authority, the claim of the wife was there better founded than here; that gift was expressed to be for the *livelihood* of the wife, no other use being expressed; this is equally expressed to be for the *joint use and support* (tantamount to livelihood) of the *husband and wife*. The case of *Kirk vs. Paulin*,^d where a bequest to a married wo-

7 Vin. Ab. 95.

man, of property "to be at her disposal," was held to give her a separate estate, can not be viewed as a parallel with this. The *separate* control, use and benefit of the wife, was there clearly indicated; *here it was expressly negatived*. The same may be said of the case of *Woodman vs. Horsley*, and *Lee vs. Prie-*

* 3 Br. C. C. 383 and 381.

aux,^e where it was held, in one case, that the words, "the wife's receipt shall be a sufficient discharge, notwithstanding her coverture;" and in the other, the same without the addition of the words "notwithstanding her coverture," were held to be equivalent to saying, "to her sole and separate use."^f

^f Clancy, 266, ch. 2.

But other cases, differing very slightly from the foregoing, shew, that very nice distinctions are to be observed in determining the character and effect of such gifts. In *Johnes vs. Lockart*, cited in *Lee vs. Prieaux*,^g it seems to have been held, that a legacy to a *feme covert*, "to her own use and benefit," was not to her *separate use*. Also it has been held, where the direction in a will was, that a sum of money should be paid to an unmarried woman, on her arriving at the

3 Br. C. C. 383

age of 21 years, or her day of marriage, "to and for her use," during her life, without the words, "sole and separate," that there, her husband was entitled to it. *Jacob and Wife vs. Amyatt*.^a Also in the case cited of *Kirk vs. Paulin*, where it was held, that the direction that the property should *be at the wife's disposal*, gave her a *separate* property; it was at the same time ruled, that a bequest, "for her use and benefit, did not create in her a separate estate. A construction similar to the latter has been put on the words "for her *own* use and benefit," where the testator has used with respect to other parts of the property given at the same time, the *technical* language, fit to confer a *separate* estate. (*Willis vs. Sayers*.)" No^{b4} Mad. 409—Clancy. 268. the notes.

doubt, however, in the case last referred to, the separate interest would have been sustained, but for the circumstance of the donor having, in the same instrument, bequeathed a different interest to the same person "for her sole and separate use," and thereby discovered his knowledge of the technical form of excluding the right of the husband—indeed the Vice Chancellor, so expressed himself.

In the case of *Roberts vs. Spicer*,^{c5} the testator had bequeathed money and rent to trustees, and directed them to stand possessed thereof, for the benefit of a married woman, and her children; and that the same should not be subject to the debts, engagements, or be in any manner under the control of her husband; and also bequeathed to the same woman £200, "to and for her own use and benefit;" it was decided, that these *latter* words did not convey a *separate* estate.^d Clancy 268.

I understand the principle of this latter decision to be, that the language employed in bequeathing the £200, did not clearly indicate an intention to create a separate property in the wife, excluding the mari-

tal rights of the husband, as was done by the same will in relation to the other money and rent therein bequeathed; that the words "to and for her own use and benefit," were not necessarily of a different import from the words, *to her own proper use and behoof*, which is a common form of expression in conveyances where no limitation or restriction of the use, but an absolute estate is intended. Another case which appears to have carried the rights of the wife to their utmost boundary, is that of *Dixon vs. Olmins*.^a There the testator had bequeathed to Lady Waltham, two bonds of her husband, Lord Waltham, and also a mortgage of Lady Waltham's estate, and all interest due thereon; and had directed, that the bonds and mortgage, "be delivered up to my said niece, Lady Waltham, whenever she shall demand or require the same." The question was, after Lord Waltham's death, whether the bonds and mortgage were to be considered as given to Lady Waltham for her separate use, and as outstanding debts against the assets of her deceased husband. It was objected in behalf of his creditors that no such intention had been sufficiently expressed; that the control of the husband over the subject had not been excluded. But Lord *Loughborough* ruled, that as these securities were to be given to the *wife on her demand*, her husband could not have obtained them from the executors, without a demand made by her, which gave her a dominion over them; and they must therefore be considered as given to her *separate use*.^b

^a Cox's R. 414.

^b Clancy, 265.

In this latter case, I think another reason might also have been urged in support of the decision. The intention was manifest to make the same disposition of the bonds and the mortgage; an ordinary gift of the bonds to the wife, or any bequest which would

have subjected them to the marital rights of the husband, must have operated as an extinguishment of them, no less than to have remitted the debts in any other way. Had this been the testator's intention, his course would have been plain and obvious. But the circumstance of his having bequeathed them to the *wife*, who was *his niece*, and of his having directed his executors to deliver them to *her*, whenever *she* should demand or require them, clearly evinced an intention not to extinguish the debts, but to retain them for the benefit of the wife, free from the control or dominion of the husband.

In cases where estates have been created for the *joint* benefit, joint livelihood, or "joint use and support," of husband and wife, or husband, wife and children, no authority has been cited, and it is presumed none can be found, for a *partition* of the property to the prejudice of the husband's creditors, or of subsequent *bona fide* purchasers under him. *Clancy*, (269) after a very learned investigation of the whole subject, and a review of the cases I have referred to, and several others, says, "All these cases clearly prove, that there must be a *manifest intention evinced by the language of the donor*, that the wife shall have the *exclusive property* in the gift, without which, Courts of equity will not suffer the legal rights of the husband to be superseded." And that if other circumstances exist, strongly warranting the inference that the testator intended the bequest for the *sole* benefit of the wife, such as her separation from her husband, and very limited means of support, and these known to the testator; yet if such intention be not expressed in the bequest, even Chancery must disregard them, and leave the estate to the operation of the law.—
(Vide also *Palmer vs. Trevor*.)

*1 Vern. 261.

This I consider a sufficient illustration of the doctrine, to shew clearly, that this gift can not inure to the separate use of the wife and child, or either ; that the marital rights of the husband have not been excluded.

This being the opinion of the Court, an examination of any other points, made in argument, is rendered unnecessary.

Let the decree of the Circuit Court be *reversed*, and the bill be dismissed ; and charge the complainants with the costs of this Court, and of the Court below.

AVENT *versus* READ.

The general rule, that a defendant in ejectment may be permitted to set up an outstanding title in another, and that the landlord may defend the action by being made a co-defendant—does not apply in an action by a purchaser at a sheriff's sale, to recover possession.

In an action of trespass, to try title, brought by the purchaser of land at a sheriff's sale, against the defendant in execution, to recover possession, the latter can not shew title in another.

In the action of trespass to try title, damages for the detention of the premises, as well as possession, are recoverable.

Read having purchased a tract of land, at a sheriff's sale, as the property of Avent, brought his action of trespass, to try title, against the latter, in the Circuit Court of Madison, to recover possession. On the trial, in the Court below, one Gaston, who claimed the land, offered to defend the action, which the presiding Judge would not permit. Avent then offered to shew a title in Gaston to the land. The Court rejected this defence, and charged the jury that

damages for the detention of the land were recoverable, in this form of action. There was a judgment for the plaintiff below, and the defendant took his writ of error to this Court.

PARSONS, for Plaintiff in error.—The Court erred in refusing to permit the landlord to defend. The landlord was permitted to defend by the practice of the Courts in England, before the statute, confirming the practice. It was, I contend, a Common Law right, and is therefore law in this country, without a statute. The Court also erred, in not permitting the tenant to defend on the landlord's title. The application, to permit the landlord to defend, was at the trial term; but this was in sufficient time. It may be said in this case, that the tenant's interest, whether more or less, was sold, and therefore he can not make defence. Be it so: say that he has no interest of his own; the plaintiff ought not, for that reason, to recover. The plaintiff must recover on the strength of his own title. In this case, indeed, the tenant was tenant by will, or by sufferance, and had not, therefore, such an interest as could be sold.—See 11 *Johns.* 437.

HOPKINS, *contra*, cited in argument, the following authorities.—3 *Littell*, 16; 10 *Johns.* 396; 2 *Mur.* 367; 8 *Johns.* 361; 13 *Johns.* 97; 1 *Johns. Cases*, 155; 1 *Marsh.* 218; 1 *Nott & McCord*, 11; 3 *Caines'* 188; 1 *Johns. Cas.* 155; 10 *Johns. R.* 232; *Roberts on Conveyances*, 488, 489; *Ala. Rep.* 331.

By Mr. Justice HITCHCOCK:

This was an action of trespass to try titles, and to

recover damages, brought under the statute, in lieu of the action of ejectment.

There are several assignments, only two of which were argued by the counsel for the plaintiff in error. The others, though not abandoned, were not particularly noticed, and as the Court, on inspection of the record, does not discover any error in them, they will not be noticed in this opinion.

The errors that have been argued, arise upon the following state of facts.

Read purchased at sheriff's sale, a quarter section of land, under a judgment against Avent, and brought this action, to recover possession. One Gaston, applied to the Court, to be permitted to defend the suit, as the landlord of Avent, alleging, that he had purchased the land of Avent, before the judgment was rendered, under which the land was sold. The Court refused to permit him to defend, and also refused to permit Avent to set up an adverse title in Gaston. The Court also instructed the jury, that in this action, the plaintiff might recover damages for the detention of the premises, down to the day of the trial of the cause.

1. Upon the first part of this case, it is to be remarked, that as a general rule, a defendant in ejectment may set up, against the plaintiff, an outstanding title in another; and the landlord may be permitted to defend, by being made a co-defendant. But this rule has exceptions, and this is one of them. It has been held,* that in ejectment, by a purchaser, under a sheriff's sale, against the debtor, who refuses to give up possession, the defendant cannot shew title in another; for the plaintiff comes into exactly such estate as the debtor had; and if it was a tenancy, the plaintiff will be tenant also, and will be estopped in a suit by the

3Caines' Rep.
188—10Johas.
293.

landlord from disputing his right, in the same manner as the original tenant, who becomes *quasi* tenant at will to the purchaser. The same principle was recognised also in 1 *Johns. Cases*, 152—1 *Johns. Rep.* 44—in 12 *Johns. Rep.* 182, and in the case of *Scott vs. Hancock*, in this Court. There was no error therefore, in this part of the case.

As to the 2d point in relation to the damages. The act abolishing fictitious proceedings in this action, declares, that the plaintiff shall endorse on his writ that the action is brought as well to try titles, as to recover damages, and that if he recover, he shall be entitled to an execution for possession, as well as costs and damages. This act received a construction ^{*Ala. R. 331.} in the case of *White vs. St. Guirons*, which sustains the decision of the Court in this case. It was there decided, that the "recovery of damages, to the extent of the mesne profits, is an appropriate object of the action of trespass." The Legislature, in giving this action, intended not only to abolish the legal fictions in the action of ejectment, but also, to enable the plaintiff in the same suit to recover full satisfaction for the detention of the premises, and thereby accomplish in one action, what before, could only be done by two; to do this, damages must be allowed from the commencement of the trespass, down to the time of trial.

The judgment must therefore be affirmed.

BULLOCK *versus* THE GOVERNOR, for the use, &c.

Where a commissioner, appointed by the Governor, to rent the University lands, had collected rents which he had never reported, it was held, that a bill for discovery, and account, was properly cognizable in equity, and that the suit was well brought in the name of the Governor—also, that there being an evident default in the non-payment of the money collected as rents, the Chancellor properly decreed interest on the account.

This was a bill filed in the name of the Governor against the plaintiff in error, in the Circuit Court of Franklin. The object of the bill, was the discovery of the amount of rents, alleged to have been received by the plaintiff in error, as agent of the University of Alabama. The answer admitted the agency, and the receipt of rents, but demurred to the bill, and made other objections as to the right of the plaintiff below to recover. The matter was referred to the Master, and on his report, a final decree was rendered against the defendant below. It was assigned, on error to this Court,

First—that the demurrer to the bill should have been sustained.

Second—that the suit could not be maintained in the name of the Governor.

Third—that interest was improperly allowed by the master on the balance of the account.

PECK, for Plaintiff in error, cited *Aik. Dig.* 428, 431, 434 ; 2 *Johns. Ch. R.* 238 ; *Cooper's Equity Pl.* 185 ; *Johns. Cases* 435, note a ; 3 *Vesey, jr.* 7, 347 ; 8 *Vesey* 2 ; 7 *Vesey* 237 ; *Cooper's Eq. Pl.* 61, 124, 125, 134, 135.

ORMOND, *contra.*—*T. Dig.* 543 ; *Aik. Dig.* 262 ; 10 *Johns. Rep.* 597 ; 7 *Johns. Ch. R.* 149.

By Mr. Justice THORNTON :

This cause is brought up to reverse a decree of the Chancellor, rendered upon bill, answer, exhibits, and a report of the Clerk and Master. The bill was filed by the Governor, for the use of the State, and afterwards amended by leave of the Chancellor, by inserting in lieu of "use of the State," "use of the Trustees of the University of Alabama." The bill charges, that the defendant below, was appointed by the Governor commissioner for the purpose of letting to rent, certain lands, which had been granted by the Government of the United States, to this State, for the support of a seminary of learning; that the said defendant, by virtue of said appointment, did let to rent a large quantity of said lands, to persons unknown to the complainant; that he assumed and took upon himself the sole and exclusive agency in collecting and receiving the money due for the rent thereof; that by virtue of such agency, he has collected large sums of money, of which he has failed to make any report, or return, whereby the amount can be ascertained: that in violation of good faith, and contriving to defraud the complainant, he has failed and refused to disclose his actings in this behalf, and to account for his receipts. The bill prays for a discovery; that an account may be taken; and that he be decreed to pay whatever balance may be found against him. The answer admits the appointment of the defendant, by commission from the Governor, which he says was received by him in January 1820. The answer, by way of plea in bar to the recovery sought, alleges, that the title to the lands in the commission designated, was not vested in the State of Alabama, but remained in the Government of the United States, until the year 1824; and that the re-

ceipts, for which he is sought to be rendered accountable, were all prior to that time. That, subsequent to this investiture of title in the State, and prior to the filing of this bill, by act of the Legislature the duty of collecting the funds, for the use of the University, was devolved upon a board of Trustees created by the said act, and made a body corporate. Hence he insists that if liable at all, for the money received by him, it is to the General Government; and furthermore, that, if liable to any one else, such liability should be enforced, not by the Governor for the use of &c., but by the said corporation. The answer also contains, as is authorised by our act of Assembly regulating chancery proceedings, a demurrer to the bill, for want of jurisdiction of the matter complained of. He then proceeds to admit, that in conjunction with ten other persons appointed to the same trust, he did, in February 1820, by virtue of the authority thus derived, rent out a large quantity of lands, taking bonds from the lessees, to the Governor. He submits as an exhibit, an account current, consisting of debits to a considerable amount of money collected by him from the lessees, upon the bonds so taken, and of credits of money paid by him; and charges for services in and about the collection of the money.

An order of reference was made by the Chancellor to the clerk or master, to take an account between the parties; which order authorises testimony oral, and by deposition, to be heard; and commands a report to the next term of the Court. At the ensuing term the master reported accordingly, an account exhibiting against the defendant a balance of \$1702 93. To this account of the master the defendant filed exceptions, specifying as grounds thereof. 1. That the master has allowed interest on the monies collected

by the said defendant, from the time of collecting the same. 2. He should not have charged the respondent with the \$240, mentioned in the answer, as being in the hands of Gray, the former sheriff. In addition to this report of a stated account by the master, he exhibits in the form of a supplemental report, several matters, which he declined bringing into the account, but submits to the Chancellor for his determination; as for instance, several judgments upon bonds for rent, taken by the defendant, whose amounts, as far as the records shewed, were still in the hands of the sheriff, and never received by the defendant: as also a claim by the defendant of \$69 as a credit, it being the difference between money and Huntsville Bank notes, which latter the defendant received to the amount of \$469, from several rentors, without suit, in discharge of their bonds. The Court adopted the reported account, and decreed its amount without increase, or diminution.

The first question presented by the assignment of errors, is whether the Chancellor should have sustained the demurrer to the bill. I can see no reason why he should have done so. The jurisdiction of the court in this case, is sustainable on many grounds. As between principal, and agent or factor, a bill for an account, is a common ground of chancery jurisdiction. A fraudulent concealment by a trustee, of matters confided to his care and management, is alleged in the bill, which contains a prayer for a discovery; as well as for an account, and decree for the balance which may be found due. If the discovery sought, were the only matter which absolutely required the interposition of the Chancellor, yet I would think it competent and proper, in a case like this, being one of account, where the materials were accessible to the

Court, to retain the cause and do justice between the parties, in order to prevent further litigation.

But admitting the matter to be cognisable by the Court, the defendant questions the right of the complainant to maintain the suit. This ground of objection is two-fold. 1. That the general government is the true owner of this fund, as it resulted from the rent of lands not then granted by her : and 2. If not so, yet the Legislature, before the suit brought, had vested the interest in the Trustees of the University, who as a corporate body could, and alone ought, to have pursued the claim. The first objection is evidently founded in bad faith, and cannot be available. The defendant admits that he received the funds, for which he is called to account, under a commission and authority, which he derived from the Governor, for the use of the State ; and should no more be permitted to retain it, under the pretext of a better title in the United States, than would the tenants to whom he rented, be allowed to resist a recovery of their bonds, by alleging want of title in their lessor.

The second branch of the objection is more worthy of consideration; at least it is not like the other, the palpable offspring of bad faith; but it is equally unavailing as a defence. By an act of December 1819, the Governor was authorised to appoint commissioners in the different sections of the State, where this donated land was situated, whose duty it was, to rent out the lands, and take bonds payable to the Governor, who was required to sue thereon, for the use of the State. This act, did not require any bond to be executed by the commissioners thus appointed; nor did their trust and authority extend beyond the mere letting of the land, and taking bonds for the rent. The Governor was the person designated to collect. It

is apparent, however, that some intermediate agency was necessary in the conduct of this litigation. It was not practicable for the Governor to attend to this matter *in propria persona*, and the agency was most naturally devolved upon the commissioners, who took the bonds, and who had them in their possession. The agency admitted to have been exercised in this case, we are authorised to consider, as derived, either expressly, or by tacit implication from the Governor. It must be viewed in this light, or else the defendant was an officious intermeddler. His responsibility is at least as great, if he acted in the latter capacity; so that he cannot complain, if the most charitable construction is put upon his conduct. Then we will assume, that the relation of principal and agent, existed between the Governor and the defendant in relation to the funds collected; and as a necessary consequence, there results an accountability to him. It is no objection to this accountability, that the interest in the subject matter had been transferred by the State, to the University, before the institution of this suit. Admit that the Trustees of the University could sue for this cause of action, yet it is perfectly consistent with legal analogy, that the Governor could still sue in relation to a subject which had been committed to him, as this was. A bailee can sue at law, by virtue of his special property, for any thing improperly withheld from him, although the true owner of it, or principal, could also maintain an action. Nor do I think there was error in permitting the amendment, by which a specific designation of the true destiny of this fund was introduced into the record. Why refuse to permit it? Its only effect could be to regulate the application, or appropriation of the proceeds of the suit. All defences,

competent to the defendant, still remained unimpaired. A recovery from him by the present suit would certainly bar any other complainant. So that there is no injury done him by the amendment.

The next assignment of errors, is the refusal of the chancellor to deduct from the balance reported by the master to be due, the sum of \$69, mentioned above, as demanded on account of the receipt of depreciated currency in discharge of the bonds of several tenants. There does not appear to be any satisfactory reason for the surrender of those obligations upon payment of less than was due upon their face. If it had been made to appear that the obligors had been in failing circumstances, and that this negotiation was made to save something in a wreck, then, on the principle, that trustees acting in good faith, and with a view to avoid a probable loss, ought not to be held responsible for mere defect of judgment in the matter of the trust, he ought to have been allowed the discount; but in this case no facts appear which would warrant such an inference.

It only remains to consider the assignment which relates to the refusal of the Chancellor to sustain the two exceptions taken by the defendant, to the report of the master. The first is for the charge of interest. The master, as the report shows, charged interest on each item of money, from the time of its actual receipt by the defendant. In the case of *Col-*
gin vs. Cummins,* this Court held that interest on an open account is not recoverable as a matter of strict right, unless agreed to be paid. Chancellors, however always decree it against trustees, where there is evident default in the non-payment of the principal; or where it has been turned to profit. Here the money was wrongfully detained at least, and we do not

* 1 Porters' R.
1 ed. 156.

think it was against equity to charge the defendant with the interest. The other exception taken to the report, and overruled by the Chancellor, was, "the commissioner should not have charged the respondent with the \$240 mentioned in the respondents answer as being in the hands of Gray, former sheriff of Franklin county." Now with regard to this, in the first place upon an examination of the reported account, it does not appear that the sum mentioned was charged against the defendant, as there is no corresponding item to be found in it. But if it was expressly included, I cannot say that the Chancellor should have stricken it out; for although the answer alleges, that the particular sum remains in the hands of the sheriff; and although the answer in this particular, may be considered as responsive to the bill charging its actual receipt; yet it may have been abundantly established by testimony before the master that it was actually received by the defendant. The answer of a defendant, responsive to a matter charged in the bill, is to be taken as true, when a cause is brought to a hearing on the bill and answer. But when the Chancellor, to procure accurate materials for his decree, refers a matter of account to auditors to hear evidence *pro* and *con*; and settle the balance; then, whatever he reports as due on one side, or the other, ought, upon a principle, of universal application to all competent tribunals, to be adopted, as just and proper, unless the contrary is made to appear. A report, conforming to the order of reference; shewing upon its face the adoption of no erroneous principle as the basis of its calculations; and no error of fact, as to the items which compose it, ought surely to be considered, as furnishing a proper foundation for the decree of the Chancellor who

adopts it. If any item of an account, properly taken, and reported, is sustained by insufficient or incompetent testimony, the party aggrieved should have excepted, and have the evidence spread out in the report; so, if any evidence offered is rejected by the master, he who offers it, should have it spread out with his exception; in this manner, reserving points for the determination of the Chancellor. If the master choose to do so, without any exception made by the parties, he may, though it is not imperatively his duty, report the evidence to the Chancellor, upon which any item has been rejected or admitted. But when it is not apparent on the face of any account, which has been fairly audited, that is, with proper opportunities afforded to the parties to contest it, that any items composing it, are improperly admitted, or rejected, if it may not be adopted as correct, the taking of an account would be a mere farce. In no way does it appear that this item was improperly charged, if charged at all, against the defendant. I think the report bears upon its face intrinsic evidence that no item was brought into the account, as a charge against the defendant, except such as he was proven to have received. We think there is no error in the decree. It must therefore be affirmed with costs.

SEWALL *versus* FRANKLIN, et. al.

The bond, authorised by statute, on the replevy of property taken in attachment, must be payable to the sheriff, not to the plaintiff in the attachment.

Bonds, voluntarily executed to civil officers, in relation to judicial proceedings, though invalid as statute bonds, may, if they contain valid and sufficient consideration, be available as Common Law bonds.

But where a sheriff, having attached the goods of A, at the suit of B, delivered them to C. and D, who did not appear to be the agents, attorneys or factors of the defendant in the attachment, or acting under his authority; and took their bond, payable to B, conditioned, for the return of the goods to the said sheriff, or for the payment of such judgment as might be had in the attachment cause: in debt brought upon the bond by B, held—that the bond was not recoverable, either as a statute, or Common Law obligation.

This case, was an action of debt, brought by Sewall, against the defendants in error, in the Circuit Court of Mobile.

The cause of action was a bond executed by defendants, and made payable to the said Sewall, conditioned, for the return of certain property to one Bates, sheriff of Mobile, or for the payment of such judgment as should be rendered in a certain attachment cause, under which, the goods had been taken.

It appeared, that Bates, the sheriff, had attached the goods, as of the property of one Stowe, at the suit of Sewall; and had delivered them to the defendants, and taken the above mentioned bond for their delivery, &c.

It was plead by the defendants, in defence of the action, with other pleas, that the bond had been executed under the above named circumstances, and was not intended to be delivered to the plaintiff: also, that neither the said goods, or the amount of the judgment, had been demanded of the defendants, &c.

On demurrer to the plea, the Court below rendered judgment for the defendants, and the case was brought into this Court, by writ of error, on the question of the sufficiency of the bond.

GOLDTHWAITE, for Plaintiff—HOPKINS, *contra*.

By Mr. Chief Justice SAFFOLD:

This was an action of debt, founded on a bond in the penal sum of twenty-eight thousand dollars, payable to the plaintiff; and conditioned, that whereas, said plaintiff had obtained an attachment in his favor, against the estate of *Daniel Stowe*, in the sum of fourteen thousand dollars, and which had been levied by James P. Bates, sheriff of Mobile county, on certain goods therein specified; therefore, if the obligors should well and truly return, and cause to be returned to the said James P. Bates, as sheriff aforesaid, the specified property, by him attached as aforesaid; or pay and satisfy such judgment as might be rendered in the attachment cause, then the obligation to be void, else to remain in full force. The declaration further avers, that afterwards, at a term of the Circuit Court, the plaintiff recovered judgment against said Stowe, for ten thousand seven hundred and eighty four dollars and three cents, on which a *fi. fa.* was sued out, directed to the sheriff of said county, commanding him, that of the goods, &c. of Stowe, he should make the said sum of money; and on which, said sheriff returned *nulla bona*. It is further averred, that said defendants did not return the property "to the sheriff of Mobile county," nor have they, or either of them, paid or satisfied said judgment.

To the declaration, as above, the defendants pleaded—

1. *Nul tiel record*, on which issue was taken.

2. A special *non est factum*, because, the writing obligatory, if any such there be, was placed by the defendants, in the hands of J. P. Bates, then sheriff of the county of Mobile, who had, under color of, and by virtue of his office, before then, levied said attachment upon said goods, and had taken the same from the possession of said J. T. Franklin, and that the said writing obligatory, was to be retained by him the said sheriff in his official capacity, during the pendency, and until the final determination, of said suit of attachment; and that the same was to be re-delivered to them, the said defendants, by the said sheriff, on their returning said goods to him: that said supposed writing obligatory never was delivered by said defendants, or either, or by any person for them, or by their authority, to the plaintiff; and that it never was intended by the defendants, or the said sheriff, that said writing ever should be delivered to the plaintiff; that if the instrument ever was delivered by the sheriff, or by any one else, to the plaintiff, the same was without the knowledge, privity or consent of the said defendants, or either of them. They further aver, that said sheriff did not, in his life-time, nor has his successor or successors in office, or any one since his death, ever demanded of the said defendants or either, the re-delivery of said goods; nor were they ever notified by said sheriff, or his successor, or by the plaintiff, that the suit was terminated; and that no demand has ever been made by the plaintiff, or by any one else, of the amount of the supposed judgment; and so they say the said writing is not their deed.

3. That the goods mentioned in the plaintiff's declaration were of no value.

To the second and third pleas, the defendants demurred. The Court sustained the 2d plea, and thereupon gave judgment for the defendants; to reverse which, the plaintiff prosecutes this writ of error.

Overruling the demurrer to the second plea, is the cause assigned for error.

The second plea contests the validity of the bond, not on the ground of illegality, or want of a good and sufficient consideration, but that it was never consummated as a bond, to the plaintiff, for the want of delivery to him by the defendants, or any one under their authority. So far as the averments of this plea are in conflict with the expressions, or legal deductions arising on the face of the instrument, I would admit, that the defendants are estopped from contesting them. To what extent the objects of the bond as disclosed by the condition, and the allegations of the declaration are irreconcilable with the facts of the plea, I will not stop particularly to enquire. It is, however, a fair inference that the property which it was the object of this bond to release, was in the possession of the sheriff Bates, by virtue of a levy of execution, so that without his agency or assent, or a tort upon his rights, the object could not have been effected. The presumption, therefore, is, that it was executed and delivered to him for this purpose. If then it was taken by him, why was it drawn payable to the plaintiff and conditioned for the return of the property to said *Bates as sheriff*? The answer would appear to be, that it was considered a statute bond taken by the sheriff in virtue of his office. Then the farther question arises, whether as the bond grew out of a judicial proceeding, was taken by the sheriff in virtue of his office, and intended as

a statute bond, it can be enforced as an individual transaction, as a bond valid at Common Law, subject to recovery by action of debt; also, if thus recoverable, does the present declaration contain the necessary allegations?

These latter views of the subject are necessarily presented by the demurrer to the pleas. The principle, that a demurrer to any subsequent part of the pleading, may be referred to the antecedent pleadings, so that the plaintiff's demurrer to the defendant's plea, may be visited on the declaration; and that a bad plea is sufficient for a defective declaration; is too well settled, to require comment. Objection is urged in argument, for the defendant in error, against the sufficiency of the declaration, on the ground, that the bond is conditioned for the return of the property to *James P. Bates as sheriff of Mobile county*; and that the breach alleged in the declaration is, that the defendant failed to return the property "to the sheriff of Mobile county," or pay the judgment. This discrepancy is found to exist; and it is also true, that the declaration contains no averment that the property belonged to *Daniel Stowe*; nor is there any allegation that it was subject to the execution, or any other averment from which injury would necessarily result as a consequence of a failure to return the property—there is no averment that the defendants, or either, received possession of the property, or any other consideration, or adequate inducement, for entering into the bond. The stipulation that the obligors would return the property, or *cause* it to be returned, affords no sufficient implication that they claimed any interest in it, or that they took and detained it from *Stowe*, or other rightful owner. Then the giving the bond by the defendants may have

been merely a gratuitous act. A *statute bond* given in the manner prescribed, without consideration, other than as security, or as the means of replevying property which the party or parties are authorised by law to do, is unquestionably valid, without scrutiny into the loss or injury accruing to the obligee, or benefit to the obligors. It is not however, contended, that this is such bond, though it may have been so intended. As a statute bond, it is invalid on the ground of its not having been executed by the defendant in the attachment, or any one as agent, attorney or factor for him according to the principle decided in *Cummins and Foster vs. Gray*.^a The same statute was in force when both bonds were given, and is equally applicable to both cases.^b though perhaps subsequently repealed.^c It is also insufficient as a statute bond, in as much as it is made payable to *the plaintiff* in attachment, instead of the *sheriff*, in whose name replevy bonds are required to be taken.^d

^a June Term 1833.

^b Toul. Dig. 17 sec. 14.

^c Act of 1833, Aik. Dig. 40 § 11. id. 41. § 13

^d 1 Stew. 130.

But it is contended, that this bond, though insufficient under the statute, is valid as a Common Law bond, and that this action is sustainable upon it as such. In support of this position, reference is made to the case of *Worsham vs. Eggleston*.^e In that case a forthcoming bond was given for property levied upon by *fi fa*. The condition of the bond recited the amount of the execution, *including the sheriff's commissions*; the District Court gave judgment on the bond accordingly. The Court of Appeals reversed the judgment on this ground, and rendered judgment for the true amount, *excluding the commissions*, to which, under the circumstances, he was not entitled. The defect in that bond, was only by way of recital in the *condition*, which was not supposed to vitiate it. Whether the bond was good under the statute, or the

^e 1 Call, 41.

Common Law, was not decided or made a question.

We are also referred to *Beale vs. Dawnman*.^a There, debt was brought on a forthcoming bond, payable to the sheriff, instead of the creditors, as required by statute; the plaintiff obtained judgment on the plea of *non est factum*. In the prosecution of errors thereon, it was assigned for causes. 1. That the bond was not taken according to law. 2. That the remedy was by motion. The Court of Appeals remarked only, that the assignments were in conflict; that the first, if true, removed the only objection to the second; and therefore overruled both. In *Johnson vs. Meriwether*,^b a similar decision was made; judgment was rendered, without any reasons being expressed in support of the decision. But a main point urged in the argument was, that an earlier act which remained unrepealed, authorised such bonds to be given to the sheriff or other officer serving the execution; that under the several statutes *in pari materia*, the parties were at liberty to make the bond payable to the officer, and recoverable in the action of debt; or to the creditor, and recoverable on motion. If such were the views which governed these cases, the principle has no application to the case before us. But in *Hoe vs. Tibbs*,^c it was held, that a *prison bounds bond*, though void under the statute, being payable to the plaintiff instead of the sheriff, might be good at Common Law; and such the Court then understood to be a principle decided in *Johnson vs. Meriwether*.—*Hewlett v. Chamberlayne*,^d *Scott v. Hornsley*,^e *Bell & Harrison v. Marr*,^f *Wilkerson v. McLocklin & Co.*,^g also, *Sugg v. Burgess & Davis*.^h

In *Morse vs. Hodsdon*, et al.ⁱ a plaintiff in replevin (being required to do so by the coroner to whom the writ was directed) gave his bond with security, conditioned to prosecute his said replevin to final

^a 1 Call, 312.^b 3 Call, 454.^c 1 Mass. 500.^d 1 Wash. R. 367.^e 1 Call, 35.^f Id. 40.^g Id. 42.^h 2 Stew. 500.ⁱ 5 Mass. R. 314.

judgment, and recover the said goods ; else the bond to be in full force. The statute required a bond with condition only, that the plaintiff should *prosecute, and also make return and pay damages if judgment be against him.* In debt on this bond, the Court held, that as it had been voluntarily given, and the obligors were by statute entitled to relief against the penalty on payment of the just damages, the bond in that way was no more prejudicial to them, than one with condition in due form would have been ; and that as the bond was to be considered good unless declared void by the Common Law or statute, and they knew of no law by which it was made void, it was to be considered valid. In *Clap, administrator vs. Coffran*,^a the action was debt on a bond given by a prisoner and his securities for the liberty of the Jail yard, in which, by statute, the penalty should have been in double the amount of the judgment, for the satisfaction of which he was imprisoned, but this was for a less sum. This objection being pleaded in bar, and the plea demurred to, the Court remarked, that the wrong sum was probably inserted through an error in computation and not from design. That the sheriff was liable as in case of an escape, the bond not being in pursuance of the statute, consequently no justification to the officer for permitting the liberty ; yet, that the plea in bar was bad : and that the defendants could be relieved against the penalty by a judgment for the true amount of the debt.

^a 7 Mass. R. 28.

^b 1 Rep.'s. 161, note 1.

^c Stat. 23 Hen. 6.

The annotator to Saunders,^b maintains the following propositions. That "a bond to save the sheriff harmless from *escapes* is against law ;" but a bond to pay money into Court at the return of a *fi. fa.* is good, for though it be done by colour of office, and the condition is not according to the statute, yet it is valid, the statute extending only to bonds given by or for

prisoners. So a bond to save a sheriff harmless against a false return of a *fi. fa.* is good. If any thing is added to the condition prescribed in the act, which is not legal, that which is inserted against the form of the act, avoids all the rest. But if a bond be taken in a circumstance contrary to the provision of the statute that is only prescribed *for the direction of the sheriff*, as to take sureties, which is for his safety; or if any thing is required *specially* by the condition, that the act only *imports*, but does not literally *require*, such variations do not hurt."

In *Syme vs. Griffin*,^a the action was debt on a *prison bounds* bond, conditioned that the debtor should keep within certain prescribed bounds, until he should discharge the debt and costs, and save the sheriff harmless; when the legal condition, as prescribed, was simply, "that he should not depart or go out of the rules or bounds of the prison to which he was committed." In that state, is the farther statutory provision, that "every obligation by any sheriff taken in *other manner*, or form by color of his office, shall be null and void; except in any special case, any other obligation is, or shall be by law, particularly and expressly directed." The Court said the question there was, whether the conditional words in the bond in question imported a substantial condition beyond that which the law authorised? They considered such to be the effect of the superadded words; consequently that the bond was void; and that every bond taken in such manner as to induce or encourage neglect of duty in a public officer, as void by the common law.

The case of the *brig Alligator*,^b has been referred to on the part of the plaintiff in error. That was a case of *libel*, in the admiralty, where the articles seis-

^a 4 Hen. & M. 277.

^b 1 Gallis. 145

ed, had been delivered on bail, by order of the Court, the claimant being bound to respond to the appraised value in case of final condemnation. It did not appear that any statute existed, authorising the delivery on bond: but Judge *Story*, before whom the trial was had, remarked, that no doubt had previously existed respecting the right of that Court to take such bonds, or to grant judgment, and award execution thereon in the usual summary manner. He also said, whether there was any statute existing, which authorised the delivery on bond, or not, he did not think material: that it being in a civil cause of admiralty and maritime jurisdiction, nothing could be better settled, than that the admiralty could take a *fidejussory* caution, or stipulation in cases *in rem*, and may, in a summary manner, award judgment and execution thereon. Again, it is said, a bond taken in such case, even supposing it void as such, which he did not admit, might be good as a stipulation: that in all cases of that nature, the security, whatever be its form, is taken by order of Court, upon the voluntary application of the party, and therefore is *apud actu*—that having jurisdiction of the principal cause, the Court must possess jurisdiction over all the incidents, and may, by monition, attachment, or execution, enforce its decrees against all who become parties to the proceedings. The principles of this decision, appear to have been materially influenced by the extraordinary powers of the admiralty, analagous to those of chancery, and the fact, that such bonds, are given *voluntarily*, and in pursuance of an order of the Court; also by the consideration, that jurisdiction over the principal cause, and the practice of the Court in other respects, gave it jurisdiction over all the incidents. This doctrine is farther illustrated by the

case of *Respublica vs. Lacaze, et al.* The action was debt on a bond, taken in the Court of Admiralty of *Pennsylvania*, in the nature of a caution or stipulation. Chief Justice *McKean*, in delivering the unanimous opinion of the Court, said, "Although a Court of Admiralty could not take a recognizance, which is a bond or obligation of record, (the Court not being one of record,) yet it could take a caution or stipulation, which is usually for appearance, or to perform a decree, &c. and is in the nature of a recognizance; that there was no positive law for declaring such a writing void, it was not given for any thing against *good morals*, or *illegal*, but for a *meritorious valuable consideration*; that if the taking the writing in Court could not give it any additional sanction, so, on the other hand, it could not destroy or prejudice its legal operation; that though void as a stipulation, it was good as a contract—just as was determined in the case of *Ascue vs. Hollingsworth*." Further, he remarked, that an instrument void as a stat. staple, may be good as an obligation; and that the case in 2 *Strange*, favored the principle; therefore, he thought the transaction in question might be considered as done *out of Court*, and that it was good and binding on the parties by the *Common Law*.

*2 Dallas, 118.

*Cro. Eliz. 544.

From this review of authorities, it appears that bonds taken by civil officers, and in relation to judicial proceedings, though without the authority of our statute, (like bonds between individuals, under other circumstances) if they appear to have been given on valid and sufficient consideration, such as is neither illegal or immoral, may be good as common law bonds. This principle is farther sustained by the case of *Lampton vs. Taylor*. There, a slave had been levied on by virtue of a *fi. fa.* and claimed by

*Littell's 2d Cases, 273.

a third person, and by the sheriff, left in the hands of the claimant. At the request of the plaintiff in execution, the sheriff summoned a jury to try the right of property, who found in favor of the claimant. Upon this, the plaintiff executed a bond of indemnity, such as required by law, to justify the sheriff in selling the slave. The claimant refused to surrender the slave to be sold, but executed to the sheriff a bond of indemnity, against all suits and demands, for not selling the slave; all these circumstances were recited in the condition. On this bond, the action of debt was brought, the declaration stating all the facts, and averring a breach of the condition. The validity of the bond was considered, on demurrer to the declaration, in the *Court of Appeals, in Kentucky*. The Court adjudged the bond *valid*, on the principle that it was not taken as a consideration or inducement to the sheriff to neglect or violate his official duty, but as an indemnity for not selling when he was incapable of doing so, by reason of the claimant's refusal to deliver the property; that it was the privilege of the sheriff to constitute the claimant, or any other, his bailee of the property, pending the claim, and he was not bound to anticipate this refusal to surrender, and without which he could not sell. The question was considered materially different from what it would have been, had the sheriff retained the possession of the slave until the plaintiff in execution had tendered his indemnifying bond, and then having the authority to sell, instead of doing so, had taken the bond from the claimant as an indemnity for his neglect of duty. That Court recognise, as a general rule, "that wherever the consideration which is the ground of the promise, or the promise, which is the consequence or effect of the consideration, is unlawful, the whole

contract is void" at Common Law. They admit some exceptions, such for instance, as an indemnifying bond to a sheriff for taking in execution property not subject to the writ; or for not selling property levied on, and claimed by such obligor. I apprehend, however, that these exceptions, if they can be considered such, rest on the doubt respecting the true title, and are not to be regarded as contracts for palpable violations, or neglect of duty.

In the case before us, nothing appears of record disclosing any criminal or vicious motive in the transaction, though *stricti juris*, the replevin by an indifferent person, was there unauthorised. The only injury that could result from the act, was, that the defendant in the attachment, or some claimant of the property, may have been deprived of their right to replevy. But as there is nothing of record shewing that the defendant was thus injured, or that the replevy was not by his friends, and intended for his benefit; or that any other person had, or wished to interpose any adverse claim, we can not assume the facts. On the contrary, as the record does not disclose the circumstances, so as to shew what disposition was made of the property—whether it was subject to the execution, or what was the motive or inducement of the defendants for entering into the bond; no sufficient consideration to sustain it, is either expressed or implied. It would seem, at least, that this uncertainty should have been supplied by the necessary averments in the declaration. But other views of the case, to which allusion has already been made, interpose farther obstacles to the recovery, as here sought; the most material of which, is, the discrepancy between the condition of the bond, and the breach assigned—the former being, that the ob-

ligors would return the goods "to the said James P. Bates, as sheriff aforesaid,"—the latter, that they did not return them *to the sheriff of the county*; who, at the time of the alleged breach, must have been a different person. The bond was given in April, 1827: the return of *nulla bona* was in April, 1831, four years subsequent—a time at which Bates, (if living, and it seems he was not,) must, by the constitution, have been ineligible to the office. If the writing obligatory, could be viewed as a recognizance, taken by the sheriff in the regular discharge of his office, and therefore, incident to the cause; the effect of the condition in the bond, might only have been, to deliver the property to the *sheriff for the time being*, regardless of the individual incumbent. But viewing this instrument in its most favorable light, as a common law bond, the legal intendment does not apply.—When regarded as a private transaction, the individuals concerned must be considered *material*; therefore, an obligation to deliver property to James P. Bates, as sheriff, does not necessarily imply, an obligation to deliver to T. L. Toulmin, as sheriff. For aught we can know, Bates may have been sheriff *de facto*, the other, *de jure*, at the time the bond was given, and the former may have remained the same, and received the property as such, prior to the return of *nulla bona*, by the latter. The obligors may have chosen in their common law bond, to recognize Bates alone as sheriff; or to bind themselves to deliver to him, or his *personal* representatives individually, and have used the designation, *sheriff of Mobile county*, only as *descriptio personæ*. At least, I think (without deciding whether that would be sufficient) that the necessity, if any, for the variance between the terms of the condition, and the breach assigned, should have

been shewn and explained, by proper averments in the declaration.

These views of the case are perfectly consistent with the argument of the plaintiff's counsel, that a party can not be permitted to aver an intention, different from that imported by his acts, or the expressions of his deed.

Another serious objection to the recovery, in the manner and form here sought, is, that the bond is in the nature of a replevy bond, for property attached. The statute, authorising such replevy, in all cases, except one, requires the sheriff to permit it, on bond with sufficient security, as in case of *special bail*; the exception is in the case of *absconding* debtors; in this only, is the sheriff authorised to require a bond for the return of the specific property, or the payment of the judgment. Nothing appears of record to show, that *Stowe*, was charged as an *absconding* debtor: if he was not, and the sheriff had taken from him, a bond in the form of this, no doubt it would have been adjudged, oppressive, illegal, and void, as in the case of *Syme vs. Griffin*. If so in relation to the defendant, I should consider it no better in reference to his volunteer friend, or any indifferent person, who has been permitted to replevy. Therefore, I am of opinion, the declaration does not disclose a legal and sufficient cause of action; consequently, that the judgment below must be affirmed.

By Mr. Justice THORNTON:

This was an action of debt, brought upon a bond; which, from the declaration and pleas, appears to have been executed in consideration of a surrender to the defendants in error, who were also defendants in the Court below, of certain property, which had been at-

tached by one James Bates, as sheriff of Mobile county, by virtue of a writ to him directed, at the suit of the plaintiff, against one Daniel Stowe; the condition of which bond was, the return of the said property upon the determination of the suit, or to pay and satisfy such judgment as might be rendered therein.

The declaration avers the determination of the suit, and the failure of the defendants to re-deliver the property to the sheriff of said county, or to pay and satisfy the judgment of the Court

The only plea, which is brought in review before this Court, contains, in addition to the circumstances above set forth, these further allegations, viz. that it was not intended, that the bond should be delivered to the obligee, who is the present plaintiff; that it was delivered up to him by the sheriff Bates, without the privity or consent of the defendants; that they were not notified of the determination of the suit, nor requested to deliver up the said property, or to pay the said judgment. The illegality of the bond, on the score of its defective, or vitious consideration, is not relied upon distinctively, as a matter of defence. To this plea, the plaintiff demurred, and upon that, judgment was rendered for the defendants; from which a writ of error is prosecuted to this Court, and it is assigned as error, that the Court below overruled the demurrer, and gave judgment for the defendants.

The first question which naturally presents itself, is the validity of the plea, the matter of which may be comprised in two propositions:

First—that the bond is void for want of delivery; and,

Secondly—that no notice of the happening of the contingency, upon which the duties specified were to arise, was given, or demand made of compliance.

But from the view, which I take of the case, it will be unnecessary to bestow any consideration upon the plea. It is very properly contended for, on the part of the defendants, that the effect of the plaintiffs demurrer, is to bring his declaration to the test; and if that be found insufficient, the demurrer should have been overruled, as it was; for, a plea, though bad in itself, is good enough for a bad declaration. Thus, then, we are led to consider the plaintiff's declaration; with regard to which, the main matter urged against it, is, that the bond, which is the foundation of it, will not sustain the action. The first question in relation to the bond, is, whether it is valid as a statute bond, in pursuance of the act, authorising the replevin of property taken in attachment, which, in all probability, it was at the time intended to be. This question is settled in the negative, by the cases of *Cummins & Foster vs. Gray* and *Adkins, et. al. vs. Allen*, heretofore decided by this Court. The sheriff should have been the obligee in the bond, and not the plaintiff in the attachment. It was not executed by the defendant in the attachment, or by his agent or attorney; nor by the defendants in this suit, as claimants to try the right: and by the decision first above cited, that part of the act, which would seem to authorise the commitment of the property so taken, to other persons, is limited in its application, to proceedings before justices of the peace; which construction of the several acts upon the subject, as they then stood at least, we are not now disposed to disturb. The next and most important enquiry in the cause is, whether the bond executed under the circumstances disclosed in the recited condition, is valid as a Common Law obligation. The surrender of the property by Bates the sheriff, which must be conceded to be the consid-

eration of the instrument, was evidently contrary to his duty. It was in violation of the rights of both parties in the attachment, thus to divest himself of its control. The defendant, in that action, had a right to reclaim the property, by the execution of a bond appropriate to the nature of the case, either a bail bond, if a non-resident, or a common replevin bond, if an absconding debtor; which by the act of the sheriff, he had rendered impracticable. So the plaintiff had a right to demand, that the property should have remained impounded in his hands, until such legal warranty was furnished for his benefit. Thus then, whatever may have been the inducement, or motive in the minds of the parties between whom it was concocted, the consideration, and the effect of this bond, were, a dereliction of duty on the part of the officer, and a violation of the rights of both the parties litigant in the attachment.

A bond taken or executed against a positive prohibition of a statute, is clearly void: so if it be substantially variant from the statute, with the provisions of which, it was intended to comply; it will be inoperative as a statute bond. But if it be not in express violation of any statute, though it may differ from it so materially as to be invalid as a statute bond, yet if voluntarily executed, it will be good as a Common Law bond, if neither the consideration, nor the promise, be in conflict with its principles. Now this bond is not expressly forbidden by any statute; nor is it taken in conformity with any. Its validity then must be tested by the principles of the Common Law. One of the best settled rules of that law is, that, wherever the consideration of a promise, or the promise itself, which is the consequence, or effect of the consideration is illegal, there the bond is void. As

to what constitutes such illegality in the consideration as will avoid the contract, or agreement, it is said, that a contract is unlawful in the proper sense, if it be the object to induce the omission of something, the doing of which is a duty in the person with whom it is made.* And again, in page 119 of the same author, it is said, a contract or agreement is unlawful in the proper sense, if it be to encourage unlawful acts, or omissions; and to illustrate these rules, he puts the case of a sheriff who had levied four oxen by virtue of a writ of *nithernam*, and returned them to the defendant, upon his bond, given to indemnify him concerning the oxen. The bond was held to be void, for that the sheriff ought to have kept the property; and the bond was made to aid him in the violation of his duty. The general doctrine indeed is admitted, but it is contended, that in the case of a sheriff, an exception to it, has been established and recognised by reported cases, which in their principle, embrace the present, and maintain the validity of this bond. This has led me into an examination of all the cases within my reach, touching this matter, comprising many of a very early date, as well as of more recent adjudication. The result of my enquiries has been, that though there may be some apparent conflict of authorities, yet the general tenor of them is adverse to the exception, upon the existence of which, as it seems to me, this bond can alone be sustained.

The cases are numerous to the points, that a bond or promise is void, if against a statute: and that, though not in conformity with any statute, yet it will be upheld as a Common Law obligation, unless in conflict with its principles. But there is a dearth of cases, comparatively, in which the question directly arises, whether a promise or bond is valid which has

been taken in consideration of the commission, or omission of an act, by an officer, contrary to his official duty.

Of the cases above alluded to, I will take a brief review, commencing with *Beawfage's case*, reported in 10 *Coke*. It was there held, that a sheriff may take a bond from a defendant, against whom he has a writ of *feri facias* to pay the debt, at the return of the writ. In this case, the reporter says, the doubt which was conceived upon it was, upon the general words of the act of 23d Hen. VI, chap. 10. The bond was held to be valid, and not embraced by the statutory prohibition. The adjudication does fairly imply, not only that the bond was not void as being prohibited by the statute, but also that it was not void for any defect in its consideration. For although the main question was, whether the statute prohibited its execution, yet if it had been void at Common Law, it would doubtless have been so ruled. And besides, it is expressly affirmed in the case, that it had been ruled on another occasion, that such a bond was not void at the Common Law. This case then, either recognises the exception to the general rule as above stated, or the consideration of the bond was not illegal. It does not appear what the consideration of this bond in *Beawfage's case*, or in the case cited in it, was. It may have been in consideration of a return of property, already levied by the Sheriff in virtue of the *fi. fa.* or in consideration that he would not levy; or it may have been without either, but a promise or covenant, made in consideration of the existing duty or indebtedness. Now if the last mentioned were the consideration, it was indubitably legal, and as it does not appear to be otherwise, the case can not be relied upon as conflicting with the doctrine, or illustra-

tion, cited from *Powell*. If the consideration had been a return of property levied, to the defendant in the writ, it would seem that even this would have been a valid consideration, and not an illegal one, as was held in 1 *Salk*. 32, which latter case has also been relied upon as establishing the exception of the case of sheriffs, from the general rule of law. This last case, was an *assumpsit* to the officer, to pay him the debt, in consideration of a return of goods actually levied. Upon demurrer, it was endeavoured to be assimilated to the case where the consideration was to permit the prisoner to escape, who was in custody on a *capias*; but the Court held, *contra*: "by the *capias* he is to *take* the body, and *keep* in *salva custodia*, and to give liberty, is contrary to the writ: but that is now to raise the money, and the sheriff may, upon a *fi. fa.* sell the goods, and this is no more in effect." So that the principle of this decision in *Salkeld*, rather maintains the general rule as applying to the sheriff, than establishes the exception; for the reasoning is, that the sheriff did not transgress his duty, and therefore was allowed to recover.

In the case of *Arundel vs. Gardiner*,^a which has ^{a Cro. Jas. 659} been relied on for the same purpose, it was held, that if a plaintiff in a writ of execution delivered by him to the sheriff, affirm to the sheriff that certain goods are the property of the defendant in the writ, liable to the execution, and require him to execute it, he shall be held liable, on a promise to execute a bond of indemnity for a seizure of the goods, notwithstanding the sheriff was a trespasser in making the levy, which was the consideration of the promise. The objection to the consideration of this promise was urged in defence, but "*non allocatur*"; for he shewing the goods, and requiring the sheriff to do execution, it is rea-

sonable that he should save him harmless; and a promise to that purpose is good enough." That the act done by the sheriff here, which was the consideration of the promise, was a tort, and contrary to his duty, the case shews; for a recovery was had against him by the owner of the goods: and yet the reasoning of the Court will shew, that the principle of the case, is not opposed to the doctrine as laid down by *Powell*. The principle of the case is, that the conduct of the plaintiff in the writ, who was defendant in the case, operates as an estoppel, preventing him from taking advantage of the illegal nature of the consideration of the promise. As where A, is about to pay value for an obligation upon B, which is a forgery; and applying to B, it is affirmed by him, that the signature is genuine; here, if sued upon this bond, B will not be permitted to defeat a recovery, by alleging the forgery; for he has induced A to take it; and it is reasonable that he should pay it. Still the doctrine would be unimpugned, that a forged bond is void in law. Subsequent to this last determination in *Cro. James*, in the 33d of *Eliz.* (*Mead vs Bygott* reported in *Cro. Eliz.* 230,) the doctrine was settled in accordance with the general rule of the Common Law, in a case somewhat analagous to that under our consideration; both being cases of attachment, where the duty of the officer is to keep the property, or to dispose of it, in a definitely prescribed manner. One Stokes was attached by two quarters of corn, at the plaint of the defendant in the case, to whom the bailiff delivered the corn, upon a promise to save the bailiff harmless of the same. Upon assumpsit brought on the promise, in arrest of judgment it was moved, that the consideration, and the promise were against law, and void; and so was the opinion of the Court;

“For, first, attachment cannot be of corn out of sacks—(by statute of 10 Will. III.) And secondly, if it may, it is to be kept by the bailiff; and he ought not to deliver it out of his hands to the party plaintiff; and so, the promise is against law and void.” Now in the second resolution in this case, the illegality of the delivery out of his hands, upon the terms disclosed, as it seems to me, is the ground of the decision.

It cannot be denied, that the custody by a bailee of the officer, is the custody of the officer himself; for it would be too inconvenient, if not impossible, to require the exclusive personal custody by an officer of all the effects, which by virtue of his office, may come into his hands; and the plaintiff in the attachment, being selected as such bailee, would make no difference in the case. But it can be no longer his custody, where, as in the case last cited, he so disposes of the property, as that he cannot reclaim it to satisfy the exigencies of justice, but relies on the bond of the bailee to save him harmless from the consequences of the illegal act of surrender. From this view of the law of the case, I have been led to the conclusion that the demurrer was properly overruled.

Reference was made by the counsel for the plaintiff, to a case in 1 *Littell's Selected cases*, 273, which was pressed with much force of argument, as being decisive of the validity of the bond sued upon in this case. Upon an examination of that case, I apprehend the just extent of its authority to be, that a bailee of property to whom the sheriff has warrantably committed the custody of it, may execute a bond to indemnify the sheriff against the consequences of his, the bailee's refusal to re-deliver it, when it was properly mandable, and unjustly detained. In this proposi-

tion there is nothing exceptionable, for the consideration was legal, and the bond only binds him to do, what without it, was his moral and legal duty. The Court, *arguendo*, I acknowledge, do intimate the opinion, that even if the surrender of the property to the said bailee had been in violation of the duty of the officer, and illegal, yet that the case of a sheriff constitutes an exception to the general rule of law, and that the bond would be good. But I do not recognise the justness of this conclusion from the authorities which they cite to maintain it.

The judgment of the Court below must be affirmed.

Mr. Justice HITCHCOCK not sitting.

ROGER versus WEAKLY, et al.

Bill filed to foreclose a mortgage on real estate, against several contending parties (whose rights doubtful,) dismissed on grounds,

1st. That the mortgage secured other property, sufficient to meet the mortgage debt.

2d. That one of the defendants having died *pendente lite*, and his representatives being materially interested, no steps had been taken to make them parties.

This bill was prosecuted by the plaintiff in error, in the Circuit Court of Lauderdale, for the foreclosure of a mortgage of real estate, executed by one Clifton, to secure the payment of a note, for two hundred dollars. It appeared, that the mortgage, also included personal property of greater value than the amount of the mortgaged debt, the balance due on

which, at the time of filing the bill, was below the sum of one hundred dollars.

Clifton had died pending the suit, and no measures, as appeared from the record, had been taken, to make his representatives parties to the bill. The Chancellor, on a final hearing, dismissed the bill, and the complainant took a writ of error here.

The questions, as determined, appear fully in the opinion of the Court.

ANDERSON, for Plaintiff.

HOPKINS, *contra*.

By Mr. Chief Justice SARFOLD:

One of the points made in this case, involves important principles; a full investigation of which, would require an elaborate research, and a nice discrimination of the authorities.

It presents the questions, whether Clifton, as obligee of the title bonds, held in the lots an alienable interest; or any title or estate which was subject to his conveyance, by the separate mortgage, so as to create in Koger a *lien*, operative against the subsequent assignees of the bond, even with notice? Whether, as the subsequent assignments of the bonds were founded *partly* on the consideration of indemnifying *Sonnoner* as security for the purchase money, and of effecting the payments to the company, by which the legal titles were procured to Weakley, the rule "*qui prior est tempore, potior est jure*," and the maxims, "*Æquitas sequitur legem*," and "*In æquali jure, melior est conditio possidentis*," do not protect the legal title? Also, whether the circumstance of the title bonds (instead of being assigned to Koger) having been left by his contract in the hands of Clif-

ton, so as to enable him, on the best evidence of his continuing interest in the lots, to assign them in the customary way to a subsequent purchaser, thereby exposing him to all the mischief apprehended from sales of property, without delivery of either the articles or the title papers, does not destroy the equity which Koger might otherwise have had? These are questions of grave import; for which reason, and because they are not indispensable to the present decision, we prefer to express no opinion upon them, and to decline a full exposition of our views on the other points of the case.

Other objections urged against the complainant's right to relief, and which we consider sufficient to sustain this decree, are these.

From the answers and evidence in the cause, it appears that the other property contained in the mortgage to Koger, was sufficient to have enabled him, with proper diligence, pursuant to the terms of the deed, to secure and satisfy the balance of his debt, the principal of which, appears to have been less than one hundred dollars. The record contains no evidence, as against *Sonner* and *Weakly*, that the bond or mortgage in favor of Koger was founded on a valuable, or any sufficient consideration to effect the former. The answer of Clifton, did it contain an admission of the consideration (which it scarcely does) could not be regarded as evidence against his *co-defendants*. Also, it appears, that Clifton's representatives are materially interested in the subject of the suit, and that their interest must be affected by the decree; and that after a suggestion of his death, the Chancellor ordered that the suit should be revived in their names. Thus the suit appears to have stood, and been continued for two or three terms, during which, no steps

McWHORTER vs. STANDIFER.

were taken to make the representatives parties, nor is any cause shewn to the contrary.

In this state of the case, the other parties being present, the Court proceeded to a final hearing, and dismissed the bill. The reasons for the decree are not given; but on these latter grounds alone, we think it sustainable, and therefore affirm the decree, and adjudge the costs of this Court, as well as of the Court below, to the defendants.

McWHORTER *versus* STANDIFER.

The decision of Chancery, upon the facts of a case, are conclusive against all parties, suing under the same facts, afterwards.

Interest, under our statute, authorising its recovery by way of damages,^a is substituted for damages. at Common Law.

And, *semble*—that if in an action of debt, no damages are laid in the declaration, yet a recovery may be had of the interest.

It is not error, that in an action of debt, or assumpsit, to recover the amount of any writing, (embraced in the statutes, authorising the calculation of interest by way of damages, for the detention of money up to the time of the rendition of judgment^b) that more interest by way of damages for the detention, is adjudged by the Court, than is demanded in the declaration: provided, it appears, that no more has been adjudged by way of interest, than is recoverable, by law, upon the debt, as shewn to be due, and unpaid, by the record.

Standifer declared in debt, as the assignee of two several promissory notes executed by the plaintiff in error, as the surety of another. On the trial, had in the Circuit Court of Lawrence, the defendant plead, in defence of the action, matters, which appeared to

^a See Aikin's Dig. 269.

^b Ib. 269.

have been the grounds of a decree in Chancery, rendered before the issuance of the writ, in this action ; and which involved the fact, of the notes sued on, having been executed as a compromise of a controversy, then existing between the principal in the notes, and the assignor of the plaintiff.* On demurrer, the Court below, held the plea bad, and thereupon gave judgment for the plaintiff. The defendant having sued out a writ of error, assigned, in this Court to sustain the same, the following matters, viz :

1. That the Court below erred in sustaining the demurrer of the plaintiff to defendant's plea.
2. That the judgment rendered in the cause was for a greater amount than that laid in the declaration.

ORMOND, for Plaintiff—cited 2 *Sten't.* 225, 70.

STEWART, *contra*.

By Mr. Justice THORNTON :

This was an action of debt, on two promissory notes for \$1250 each, executed by the plaintiff in error, as security for Hance McWhorter, to Izrael Standifer, assignor of the defendant in error, bearing interest from their date, which was the 16th of November, 1821. The judgment in the Court below, was rendered on demurrer for the defendant in error, on the 3d Monday of September, 1833. The assignment of errors, are

1. The Court erred in sustaining the demurrer to the plea of the plaintiff in error, and,
2. That the judgment is for a larger amount of damages than is laid in the declaration.

*See 1 Stewart, 532.

As to the first error assigned, in order to determine the propriety of the decision made below, we must take into view an agreement of record, which materially affects the question. Before the demurrer was decided, there was an agreement, that all the facts of a chancery cause, heretofore adjudicated, between the defendant in error, and Izrael Standifer, and the said Hance McWhorter, parties to the notes now sued on, should be taken as admitted in this case. The effect of this agreement, is to constitute those facts a part of the plea. Then the facts upon which the judgment of the Court was pronounced were, that Izrael Standifer who was the assignor of the present defendant in error, recovered a judgment against Hance McWhorter, for a large amount of money, in the Circuit Court of Franklin county. That before any execution issued thereon, a compromise was effected on the following terms. It was agreed, that if the defendant in that judgment would pay a certain sum of money, less than the amount of the judgment, and agree not to take any writ of error to reverse it, the assignor of the defendant in error, would not attempt to collect the same, but would enter a satisfaction of record. That in pursuance of this agreement of compromise, the two notes now sued on were executed by the plaintiff in error as security for, and with said Hance McWhorter, the defendant in the compromised judgment. That satisfaction was accordingly entered of that judgment: but that afterwards, in violation of this agreement, a writ of error was sued out to the Supreme Court. and the judgment was reversed, and rendered, for an amount greatly less, than the sum agreed to be paid at the time of the compromise. Upon this state of facts, the Court below decided, that the demurrer

was well taken; and rendered judgment for the defendant in error. This determination of the cause, was in conformity with the decree of this Court, upon the same facts, in the case of *Standifer* and *McWhorter*, in 1st *Stew.* 532; and although that was a chancery cause, and not between the same parties, so as to be strictly *res adjudicata quoad hoc*, yet the principles therein determined, we think, are correctly settled, and are decisive against the plaintiff in error as to his first assignment.

We will proceed to the consideration of the second assignment of error, as to the excessive damages. The action was for \$2500 debt, and the damages laid in the count for the detention thereof, were \$2000. The judgment on the demurrer is for the debt declared for, and \$2366 damages sustained by reason of its detention. By calculation, I find that the amount of damages allowed as interest, though greater than the sum laid in the count, are somewhat less, than the amount really due. The question raised by this assignment has never been decided by this Court; and when considered, as affected by our statutes, ascertaining the amount recoverable in all cases, as damages for the detention of money, and authorising its calculation, at the fixed rate of 8 per cent. per annum, down to the rendition of judgment, may be said to be *res integra*.

It must be admitted, that the ancient rule of law, prohibits the recovery of more damages, than are laid in the declaration; and that this rule did apply, even to the action of debt, where damages were not the sole, or even the main object of the suit. When a rule or principle is clearly established by those sources from whence we derive our knowledge of the Common Law; as that Common Law is our rule and

guide of decision, where no express legislation has changed it; we must adopt it, unless upon the principles of that law itself, the refusal to apply its doctrine to any given case, can be shown to be just, and proper. It is one of the wisest maxims of that system of jurisprudence, imparting the necessary flexibility to its otherwise stern, and inexorable character, that "where the reason of the law ceases, the law itself ceases." Let us examine the reason of the doctrine, which I admit is recognised by the books, that it is error to give judgment for more damages than are demanded in the declaration. If I be not greatly deceived, the reason wholly fails, when applied to the action of debt, at this day; at least in our State, where damages for its detention are fixed by positive law, with reference only, to the amount of the debt, and the time, from its accruing, down to the rendition of judgment; which facts, the writing which is the foundation of the action, will shew. The foundation of this doctrine is laid, in the first place upon a hypothesis, that every man who complains of an injury, best knows the extent of it; and secondly, upon the principle, that the *probata* must correspond with the *allegata*, which hypothesis and principle, combined and followed up, result in the rule we are considering. The verdict must correspond also with the *probata*, and the judgment with the verdict. But every man best knows the extent of his damage, and having declared it, no proof shall be heard to enlarge it; and by consequence, a judgment which is for more, has nothing to sustain it, and ought to be reversed. In all cases where the action was for damages merely, and those damages had accrued prior to the commencement of the action, the application of the rule is just. Where, however, the damages were still

accruing, beyond the time when the suit was brought, so that the party complaining could not possibly divine to what extent they might arrive before final judgment, but could only estimate what he had sustained when he preferred his complaint; and where a recovery was allowed to be had for the increasing damage, even though this damage depended upon proof, which must conform to the *allegata*, yet I find that the rule was relaxed, and made to yield to the true reason of the case.

In *Com. Dig. 3 v. 351*, citing 1 *Roll. 575*, 1, 10, it is said, "in detinue, the plaintiff may recover against the garnishee more damages, than were alleged in the declaration; because he recovers for delay after his declaration." The reason why there was no relaxation of the rule in the case of debt in the debit and detinue for money, was, I apprehend, that the damages for the detention, were not only mere matter of proof, but were only recoverable down to the time of commencing the action. Then, as an estimate or judgment could, in presumption of law, at least, be formed of the amount of injury or damage sustained, (for all had accrued that could be compensated,) he was held to his own declared amount; at least, that was the *maximum*, and no proof could be heard of any greater. Of course, the verdict and judgment had no foundation as for any thing beyond that point. The reason of the rule evidently was, that the party could, in the given case, form an estimate of his damage, as it all had accrued for which he could recover at the time of his complaint preferred; and therefore it was proper, not to allow any proof to be heard, to carry it beyond his own demand; for on the principle of self love, it may be safely assumed, that the estimate of ones own wrongs, does not

fall short of the point, to which impartial justice would arrive. But in the first place, the recovery of damages in the action of debt, at least, where founded as here, upon a written contract, ascertaining the amount due, &c., is no longer dependent upon any extraneous proof whatever; no circumstances can vary them from the standard fixed by law, which is 8 per cent. per annum. So also, we have a statute authorising the recovery of interest, which is substituted for the Common Law damages for detention, down to the rendition of judgment; whereas those damages before the existence of those statutes, were supposed to have all happened before the institution of suit. Now, as the damages, or rather the substituted interest, in part, at least, depend upon circumstances not yet in existence; when the suit is brought, it is absurd to say that the party complaining, has estimated his damage, for that damage itself, to some extent, has not yet accrued. The plaintiff in debt can, by a calculation, ascertain, to be sure, the amount due when he issues his writ, but if he attempt to anticipate, it must be all guess work; and that which may be fixed at random, may well be considered as merely nominal, and formal. In accordance with this view of the subject, it is determined, that if no damages at all are laid in the declaration, in an action of debt, yet a recovery can be had of the interest. So under the Petition and Summons Act, which applies to all cases for the direct payment of money secured by bond, or note, all that is necessary, is to pray judgment for the debt, and damages for the detention of the same, without specifying any amount of damage. Interest is substituted by statute, for damages at Common Law, for the detention of the debt. They now admit of no proof, and require no

 CALDWELL vs. GILLIS, and ux.

allegation, in contracts subjected to our own laws. Their omission altogether, or their statement, no matter for how much, or how little, is wholly nominal, formal, and of as little account in the balances of justice, as the appendage just below them, of *John Doe, and Richard Roe*, pledges to prosecute. We feel authorised from these views to decide, that, in the action of debt, or assumpsit, brought to recover an amount of money secured by any writing embraced in the statutes above alluded to, it is not error, if more interest by way of damages, for detention, is adjudged by the Court, than is demanded in the declaration, provided it appear that no more has been adjudged by way of interest, than is recoverable by law upon the debt, as shewn to be due, and unpaid by the record.

Let the judgment be affirmed.

 CALDWELL versus GILLIS, and ux.

If a receipt in discharge of a right has been executed voluntarily and with a proper understanding, and there is no proof of fraud, mistake, or ignorance of the rights of the party executing it; the presumption in favor of its validity, must prevail.

Where it appeared that a receipt, charged to have been procured fraudulently, was the motive which induced the defendant to distribute an estate to the advantage of the complainant, and at the risk of injury to the defendant; and there was no proof of fraud in procuring the receipt; the Court refused to determine the receipt void and inoperative.

This case originated in a bill in Chancery, filed in the Circuit Court of Conecuh, by the defendants in error, against the plaintiff and others, distributees, for relief, &c.

The bill charged the defendant, as administratrix of the estate of her husband, who was the father of complainant's wife, with having, by fraudulent representations, procured from the wife of the complainant, before his marriage, in discharge of a right she possessed in the estate of her father: also, to recover two children, alleged to have been the issue of a slave given to the complainant's wife, by her father.

The answer denied the allegations of the bill, generally; and upon a final hearing, the Chancellor dismissed the bill as to all the defendants, except the plaintiff in error, and as to her, decreed, that the balance of a judgment for which the receipt appeared to have been taken, should be paid out of the assets in her hands belonging to her intestate.

The proof did not sustain the allegations of the bill as to the gift of the slave; nor the fact of the receipt having been fraudulently obtained; and to reverse the decree of the Court below, the defendant brought the case into this Court.

PARSONS & COOPER, for Plaintiff.

GOLDTHWAITE, *contra*.

By Mr. Justice THORNTON:

This was a bill in Chancery, filed by the defendants in error, against the plaintiff, who was the relict, and administratrix of the father of Nancy; as also, against several others, co-distributees with the said Nancy, of the estate of her deceased father. The object of the bill, was to recover two negro children, on the ground alleged, that the father, in his lifetime, had given their mother, a negro woman named Mary, to the said Nancy: and to procure the cancelment of a receipt which was executed by Nancy, some short

time, alleged to be only a day,) before her marriage with the said John Gilles, to the plaintiff in error, by virtue of which receipt, a judgment against the said Sarah, as administratrix, in favor of one Muse, and by him assigned of record to the defendant Nancy, was claimed to be satisfied; as also for the payment of the amount due and unpaid upon the said judgment. The bill charges, that this receipt was fraudulently procured from the defendant Nancy, by false representations made to her, by the widow and co-distributees; that the transfer of the judgment, was made to her jointly with the other distributees of her father's estate; and that the only consideration of the execution of it was, in the language of the bill, "for and in consideration of the said slave Mary; heretofore charged as given to your oratrix, no other consideration whatever having been given to your oratrix for the same."

The bill also charges that this receipt was executed without the knowledge or consent of the said John, and was in fraud of his marital rights. The answers all deny the gift of the slave Mary, by the deceased father. They also deny any fraudulent representations by which the receipt is charged to have been procured. They allege, that it was well known to Nancy, that the whole interest in the judgment, was exclusively her own, and that it was executed upon a final distribution of the whole estate of her father, between her, and her co-distributees, for the purpose of enabling the distribution to be made as it was, by the administratrix, of the property remaining in her hands, after the payment of all the other debts due from the estate, except the said judgment. The proof wholly fails, to establish the gift of the slave Mary, to Nancy, by her deceased father; or to sustain the allega-

tion of fraudulent misrepresentations inducing the execution of the receipt. The Chancellor dismissed the bill as against all the other defendants to it, except the administratrix; and decreed the unpaid balance of the judgment, against her, to be satisfied out of the unadministered assets of her decedent's estate. The only ground upon which this decree can be sustained, is that this receipt is a nullity; and did not discharge the judgment as it purported to do. We do not think that there is any principle of equity, which would authorise its cancelment, under the state of facts presented by the record. The presumption in favor of the validity of a receipt must prevail, unless proven to have been procured by fraud, mistake, or ignorance of the rights of the party executing it.— Even a purely voluntary receipt, like a gift executed by delivery of the thing given; is conceived to be binding against the party who fairly, and understandingly makes it. But this receipt can not be said, to be voluntary in its character. The result, from the bill and answer is, that if it was not executed in consideration of the slave Mary, as expressly alleged in the bill, it was, at least, the motive which induced the administratrix to surrender, and divide out the estate; by which distribution, thus induced, and procured, the said Nancy, not only only received more than as distributee, she was entitled to; but a great injury might have accrued to the administratrix by this divestiture of the property; which of itself, would constitute a valid consideration.

So far as this receipt may be supposed to have been made, in fraud of the marital rights of the husband, although the bill charges that a fraud was practised upon him in general terms, yet it does not present any facts, which constitute in themselves

*1 Bac. Ab. 485
tit. Bar & Feme
2d Brown's C.
R. 345.

such a fraud. To constitute a fraud upon the intended husband, some thing more must appear, than the mere facts of the execution of the receipt without his knowledge and consent, and the subsequent marriage, before his having learned it. The concealment, or failure to communicate the execution of such receipt, is only one of the necessary ingredients in the fraud, but can not constitute it. It does not appear that he ever knew that Muse had transferred to her, the equitable interest in this judgment, much less, that any idea was ever held out to him, that on the marriage he would be entitled to it. We therefore do not think it void on this last ground, any more than on the first.* So far as the decree subjects the plaintiff in error in any way, it must be reversed, at the costs of the defendants in error, in this Court, and in the Court below.

HAYNES *versus* SLEDGE AND MAXY.

A writ, which appeared from the teste thereof, to have issued on Sunday, held void.

But, ruled competent for a plaintiff by replication to a plea, 'that a writ issued on Sunday,' to show facts authorising its issuance.

Semble—that circumstances which would justify the *service* of process, under the statute of 1803, would likewise authorise its *issuance*.

The plaintiffs below, Sledge and Maxy, declared against the defendant Haynes, in the action of trespass on the case. The defendant plead in abatement of the writ, that it had issued upon the Sabbath, and on demurrer, the Circuit Court held the plea bad, and gave judgment thereon for the plaintiff.

The case was brought up, upon this point, from the Circuit Court of Montgomery.

GOLDTHWAITE, for Plaintiff—Cited 7 *Comyn*, 399 ; 2 *Dyer*, 168.

By Mr. Justice THORNTON:

This was an action of trespass on the case, brought by the defendants in error, who were plaintiffs below, against the present plaintiff. The only error assigned is, that the Court below sustained the demurrer of the defendants to the plea in abatement, filed by the plaintiff. The plea was, that the original writ issued on Sunday, as was apparent from its teste. The maxim of the Common Law "*Dies Dominicus non est juridicus*," as we learn from all the authorities, which we consult for its principles, expressly embraced and avoided every original process obnoxious to this objection.*

There is no provision in our Constitution, or any enactment of our Legislature, which, by implication, or expressly, in the letter or spirit of it, abrogates this rule. The Declaration of Rights contains several clauses on the subject of religion; all of which have for their object, the preservation of the rights of conscience, and the security of the citizen from any violation of his civil rights, privileges, and capacities, by means of any religious testes, or ecclesiastical establishments. It is expressly said, no human authority ought in any case whatever, to control, or interfere with the rights of conscience. Now, if by express legislation, every original writ were declared void, which issued on Sunday; I could not say that such an act, was in violation of the letter, or spirit of the constitution. I would rather incline to the opin-

*20 Vin. Ab. 63,
63, title Sunday—7 Comyn.
Dig. 399—3d
Burr. 1598.—2
Dyer, 168.

ion, that it would not be. For although a Jew, a Turk, or a religious sectarian of any conceivable faith, or persuasion, might fill the office of clerk; and the doing of the forbidden act, would be no hurt to his conscience, and a fruitful source of profit; yet, such a municipal regulation, of the functions of the office, would surely be no violation of the rights of conscience; nor unconstitutional preference, of one sect to another; nor establishment of religion by law. Then the Common Law rule doing the same thing, would be liable to no greater objection.

We do not hesitate to declare, that it is incompetent to the Judiciary, to abolish this rule of the Common Law. To decide that a writ issued on Sunday, is valid, would be equivalent to saying, that the performance of the official duties of a large class of public functionaries, is as obligatory upon them, on this day, as on any other; for if the officer *may* do so, it might well be argued that he *must*; and we would by judicial decision, be imposing a duty upon him, contrary to the Common Law, which the Legislature have never, in this instance, thought proper to abolish.

•Aik. Dig. 440 We have a statute, making void to all intents and purposes, the *service* of any process on Sunday, except in criminal cases, or for a breach of the peace, unless upon affidavit made as prescribed, "that under cover of the said first day of the week, the person liable, intends to withdraw, or escape from the State." It would seem to me, that in those instances, where from the urgent necessity of the case, *service* of process is authorised, its *issuance*, is under the same circumstances, rendered a matter of duty; and being provided for the prevention of fraud, and iniquity, could not shock the moral, and religious

COX, et al. vs. COX.

sense of the community, as a general disregard of the Sabbath, assuredly would. If the writ in this case had been issued under circumstances making it an exception from the general rule, or if other facts exist, which would avoid the plea, it would have been competent to the party to have shewn it, by his replication; and as by the decision of the Court, it was held that no such shewing was necessary, the opportunity will still be allowed for the plaintiff to do so.

Let the judgment be reversed, and the cause remanded.

COX, et al. *versus* COX.

In an action against several copartners, on a copartnership debt, the notice authorised by the statute of 1807, providing for taking the depositions of a witness, about to leave the State, is good, if only served upon one partner.

Where a commission, to take the testimony of a non-resident witness, appeared to have regularly issued, the Court held it not error, that the witness, being temporarily within the State, was examined here, and his interrogatories taken by the commissioner.

The answer of a defendant, to a bill, filed for the discovery of testimony in aid of a trial at Common Law, may be used, by the plaintiff on that trial, or not, and if used, any other evidence consistent with the issue, is not thereby precluded.

Assumpsit, by defendant in error, in the Circuit Court of Madison; and the plaintiff declared against the defendants, copartners in trade, for certain goods, wares, and merchandize, before the commencement of the suit, sold and delivered. It appeared, from the writ, that it had been executed upon two of the partners, and returned *non est inventus*, as to one.

In support of his claim, the plaintiff offered the deposition of a witness, which had been taken, on

an affidavit, that he was about to leave the State : also, the answer of the defendants to a bill in Chancery, filed for the discovery of testimony; and the depositions of a non-resident witness, which it appeared had been executed while the witness had been on a temporary visit to the State.

After judgment in favor of the plaintiff, defendants took a writ of error here, and assigned as causes thereof,

1. That the notice issued to the defendants, on proceeding to take the testimony of the witness, (about leaving the State) had been served only upon one of the partners.

2. That the plaintiff having relied on the answer of the defendants in Chancery, was thereby precluded from introducing evidence *aliunde*, as to the answer, or the facts therein denied.

3. That the commission to take the testimony of the non-resident witness, had been executed within this State.

S. PARSONS, for Plaintiff in error—Cited *Aik. Dig.* 126—3 *Bibb's Rep.* 303—12 *Vesey*, 355—1 *Peters'* 367—*Johns. Ch. R.* 182—15 *Johns. R.*—1 *Peters'* 372.

HOPKINS, *contra*.—Cited *Gow on Part.* 312—*Chit. on Bills*, 37, 299—2 *Marshall's R.* 615—3 *Littell's R.* 250, 378—1 *Stewart*, 374.

By Mr. Justice HITCHCOCK :

This was an action of assumpsit, brought by the defendant in error against the plaintiffs in error, as partners, for goods sold and delivered. The writ was served upon H. and J. H. Lewis, and returned not found, as to Cox. The declaration is against them all : they all

pleaded jointly, non-assumpsit, &c. and a verdict and judgment were had against them in the Court below.

At the trial at bar, the deposition of William B. Scruggs was read by the plaintiff, to which exception was taken by the defendants, on the ground, that notice of the time and place of taking the same, was served only on one of the defendants, J. H. Lewis.

It appears that in the affidavit, upon which the commission for taking this deposition issued, the plaintiff stated that the witness was then about to leave the State for the benefit of his health, and that all the defendants except J. H. Lewis, were then absent from the State. The Judge directed a commission to issue to take the deposition of Scruggs, upon the plaintiff's giving J. H. Lewis five days notice of the time and place of taking the same, which was done, and the bill of exceptions shews, that Scruggs died soon after the deposition was taken, which was in February, 1829. The writ was returnable in October, 1828. The pleadings were made up at the return term, and it was admitted that the firm of the defendants below, was dissolved in 1826.

By our statute, the deposition of a witness, who is about to leave the State, may be taken by the Judge where the cause is pending, provided sufficient notice of the time and place of such application has been given to the opposite party—"or said Judge may order the Clerk of the Court to issue a commission to one or more persons to take the deposition of such witness, such notice being first given to the *adverse party*, of the time and place, when and where, such deposition is to be taken, as the Judge awarding the same, shall direct."

All depositions are taken *de bene esse*, and can not be read at all, if at the time of trial, the personal attendance of the witness can be had. But to prevent a failure of justice, the statute has authorised depositions to be taken in certain specified cases, leaving it to the Judge to prescribe the notice which shall be given to the *adverse party*. In this case, it appears, that the defendants were sued upon a partnership contract; that they had pleaded jointly; that two of the defendants were out of the State, so that no notice could be served upon them; and that the witness who was then about to leave the State, for the benefit of his health, died shortly after the deposition was taken.

Under these circumstances, we think the notice, as served, was sufficient. It being a partnership debt, the defence being joint, all were liable or none. It was not like the case of an action founded in tort when judgment might be had against one or more, and when the defence might be separate, or when it might conflict one with the other.

The expression *adverse party* is a collective term, and does not necessarily imply a separate notice to each defendant; and we may intend that notice to one is notice to all. We think it analogous to our statute, which authorises service of a writ to be made upon one or more partners, and declares that, to be service upon all. The dissolution of the firm before suit brought, does not vary the case. The defendants being originally, if at all, jointly liable, no subsequent arrangement between the partners ought to change the remedy of the plaintiffs. In cases of protests of bills of exchange, notice to one partner, will bind all, though after dissolution.*

*15 Ves. 226.
Gow, 312.

After the reading of the above deposition, the plain-

tiff read the separate answers of the defendants to a bill filed by the plaintiff during the pendency of the suit, for a discovery of testimony to aid him in the trial at law. In these answers, Cox admitted the facts charged in the bill. Hickman Lewis stated his ignorance of the facts; and John H. Lewis denied them. The answers were all read, without any objections on the part of the defendants.

The plaintiff then offered to read the depositions of D. J. Hines, and William H. Wilkinson taken after the answers had been filed, both of which were objected to, on the grounds,

1. That the deposition of Wilkinson, was taken within this State, though it was applied for on the ground that he were a *non resident*; and,

2. That the plaintiff having read, and relied upon the answers in Chancery, of the defendants, was thereby precluded from taking and relying upon testimony, on the points to which discovery was sought by the bill, and which was denied by the answers.

The Court overruled these objections, admitted the testimony, and instructed the jury, that they were "to take into consideration as well the depositions as the answers, in coming to a decision of the case."

As to the first objection, it is sufficient to remark, that it is immaterial where the deposition was taken: the witness being a resident of another State, entitled the plaintiff to the benefit of his testimony on interrogatories; and if the witness was temporarily here, and the requisites of the statute were complied with, in filing the interrogatories, and giving the defendant an opportunity to file cross interrogatories, the commissioner had the right to select his own time and place, where he would execute the commis-

sion, and could do it as well within this State, as out of it.

Nor is there any force in the second objection.

When a party files his bill for *discovery and relief*, and the ground of equity jurisdiction is predicated solely upon the necessity of going into Chancery for discovery; if that fails, the bill must be dismissed; no testimony *aliunde* being allowed purely in aid of the jurisdiction of the Court.^a But when a bill is filed for discovery of testimony, in aid of a trial at Common Law, the party may either use the answers, or not, as he chooses, and if used, it stands upon no other or higher grounds than other testimony, and any other evidence not inconsistent with the issue, may be introduced, whether it contradicts the answer or not, and the jury will weigh the whole evidence, as in other cases.^b

^a Bibb, 303.

^b Peak's Ev. 58
3 Littell, 379.

The judgment must be affirmed.

Mr. Justice THORNTON, not sitting in this case.

FAULK *versus* THE JUDGE OF THE COUNTY COURT OF MONROE
COUNTY.

Suit cannot be maintained against the surety of an administrator, on the administration bond; where it does not appear, that a judgment has been rendered regularly against the administrator, as such.

By Mr. Justice HITCHCOCK.

This was an action of debt brought on an administration bond, against one of the securities, suggesting a *devastavit* by the administrator.

The declaration does not set out a judgment against the administrator as such, but declares upon a judgment rendered by a magistrate in favor of Wm. A. Stewart, against him generally, for medical attendance during the last illness of the intestate, and a return of *nulla bona* on the execution. There is a demurrer to the declaration, but two pleas afterwards appear, upon which, a verdict and judgment were rendered for the plaintiff.

There are several assignments of error, one of which, only will be considered, which brings up the sufficiency of the declaration.

This Court decided in the case of *Burke vs. Adkins, et ux.** that before an administrator could be sued for a *devastavit*, there must have been a judgment *de bonis testatoris* regularly entered against him. This does not appear to have been done in this case, and it is conceived that a security to an administration bond, stands on as favorable ground as the administrator himself, at least. Whether, when a judgment is had, which would lay the foundation for a proceeding against the administrator, for a *devastavit*, without first actually fixing a *devastavit* judicially upon him; it would enable the party to proceed against the security in the bond, it is unnecessary to decide. The principle decided in the case above referred to, being decisive of this case, the judgment must be reversed.

* See p. 236 of this volume.

**THE BRANCH OF THE BANK OF THE STATE OF ALABAMA AT
MONTGOMERY *versus* HARRISON.**

The notice authorised by the 9th section of the act of incorporation of the Branch of the Bank of the State of Alabama at Montgomery, to a maker or indorser of a bill or note, need not be under the corporation seal.

The summary proceeding authorised against the debtors of such Bank, though different from the Common Law course, is yet remedial in its character, and if substantially pursued will not be defeated by mere technicalities.

This was a motion in the Circuit Court of Montgomery by the plaintiff in error against the defendant, on a bill of exchange. It was objected that the notice should have been under the corporate seal of the Bank, and that it was otherwise insufficient. The Court below quashed the notice, and the cause was brought into this Court by writ of error.

By Mr. Justice THORNTON:

This was a proceeding in the Circuit Court of Montgomery, under the 9th section of the act incorporating and establishing the Branch of the Bank of the State at that place. The notice was quashed, and judgment entered for the defendant, which is assigned as error. The object of the section, which gives the remedy here pursued, was a substitution of the President of the institution, for an attorney, who otherwise would have been required to be appointed, according to the peculiar mode of action by a corporation. The President for the time being, who is a public officer, is made, as to the mere mode of instituting legal proceedings in behalf of, or against the Bank, the medium of action; thereby superseding the necessity of all those technical means, required by the Common Law, in the conduct of such litigation. Al-

though this provision of the act of incorporation provides a summary remedy, different from the Common Law course, yet is it also remedial in its character, and if substantially pursued, should not be defeated by scholastic criticism. The clause in the charter, after describing the cause of action, as one in favor of the Bank, &c., proceeds thus, "it shall be lawful for the President thereof, after having given thirty days notice to the maker, or endorser, as the case may be, to move the Circuit Court of the county in which said Branch Bank may be established, on producing to said Court, before whom the motion is made, the certificate of the President thereof, that the debt is really and *bona fide* the property of the Branch of the Bank of the State of Alabama, for judgment; and the Court shall proceed to render judgment accordingly." The notice in this case conforms literally with the act. It is given by the President as such, notifying the defendant, that he will move for judgment, on a bill of exchange, which he avers is due to, and owned by the said Branch Bank. The office of the notice is to inform the party of such matter, as will enable him to make defence against the motion. Here the cause of action is particularly set forth; the property alleged to be in the Bank, and the time, and place of moving, distinctly averred. The objections urged in this case, are, that the notice does not say expressly, in whose favor the motion will be made, and that it is not under the corporate seal. When we consider, that the act required to be done by the President, that is, giving the notice, is not the act of the corporation, but of its officer; and is not by virtue of an authority, derived either mediately, or immediately from the corporation, it will readily appear, that the authenticity

HARRISON, vs. WEAVER.

of its seal is not requisite. And as for the other objection, if, by necessary legal implication any fact, is apparent in the notice, which it is important to the defendant to know, I would consider it sufficient. Could any one fail to know, under this notice, in whose favor the judgment sought against him, should be rendered? The judgment is the act of the Court, and is nothing more than the legal result, from the facts disclosed in the notice, and the act of incorporation. If the charter had expressly directed the judgment, to be rendered in favor of the President, it should be so entered; but in the absence of such a direction, it would surely be a palpable error, to render judgment, except for him, in whom the right is. I think the notice in this case is a substantial compliance with the act; that it gives sufficient information of every matter necessary to the defence, and would have authorised the hearing of the motion for a judgment.

Let the judgment be reversed, and the cause remanded.

HARRISON *versus* WEAVER.

Where, in an action, by the indorsee of a note against the maker, the declaration described it as payable to *A. B.* or order, and the note was payable to *A. B.*—held to be an immaterial variance.

A variance in the description of a contract, which must be construed the same, whether the variance exist or not, not changing its nature; will not be regarded.

Weaver instituted an action of debt in the Circuit Court of Bibb, as endorsee of a promissory note. The

declaration, filed in the cause, complained against the defendant, as the maker of a note, payable to one McGough or order, and by the latter, endorsed to the plaintiff: but the note, when produced on the trial, was payable alone to McGough and not to order; whereupon the defendant moved the Court to exclude the note as evidence of the demand, because of the variance apparent in the declaration: but the Court held the objection unavailing, and judgment was entered for the plaintiff. The defendant took a bill of exceptions upon this point, and brought the case into this Court.

PICKENS & CLARK, for Plaintiff.

GOLDTHWAITE, *contra*.

By Mr. Justice HITCHCOCK:

This was an action of debt on a promissory note dated, 20th January, 1831, for \$50, due the 8th March, 1832, made by the defendant, *payable to John McGough*. The declaration is in the usual form, and corresponds with the note, except that it describes it as payable to John McGough, *or order*—the plaintiff declares as the endorsee of the original payee.

At the trial below, the defendant objected to the note being read to the jury on the ground of variance between it and the declaration, in describing it as payable to order, when the words, *or order*, were not in the note. The Court overruled the objection, and permitted the note to be read, to which, exception was taken, and which is assigned for error here.

It is a general rule, that the contract declared on, must be stated correctly, and if the evidence differ from the statement, the whole foundation of the action fails, and if the party attempts to set out the con-

a 1 Chit. Pl.
334.

tract in *hæc verba*, a technical *variance* in an immaterial matter will be noticed. But when the pleader does not attempt this particularity, it is sufficient to declare according to the *legal effect* of the contract.*

By our statute, "all bonds, bills single, promissory notes, and all other writings for the payment of money or any other thing, may be assigned by endorsement, whether the same be made payable to *the order* or assigns of the obligee or payee or not, and the assignee may sue in his own name, and maintain any action which the obligee or payee might have maintained thereon, previous to assignment," &c. By this statute the legal effect of a note not payable *to order*, is precisely the same as if payable to order, and the pleader not having attempted to describe the note in *hæc verba*, the objection was properly overruled.

9 Wheat. 558

The plaintiff in error has relied upon the case of *Sebree et al. vs. Dorr*.^b There the action was upon two promissory notes: one of the notes was for \$311 31, payable twelve months after date, to the defendants, order at the Bank of Discount and Deposit of the United States, at Lexington, but it was described as a note payable generally, omitting the time—that it was *to order*—and the place where payable; the other note was for \$10,065, *payable at the Office of Discount and Deposit of the Bank of the United States, without defalcation, for value received*; but in the declaration there was a total omission to state where the note was payable. In relation to the first note the Court, say, "these are all material parts of the declaration, and they are all omitted; and in relation to the latter, they say, that nothing is clearer, both upon principle and authority, than that, if the place where a note is payable, is omitted in the decla-

ration, it is fatal; there is a variance in the essence of the instrument, as declared on and proved.

Had the question in that case only presented the single point of variance, that the one under consideration does, to wit, insertion of the words *or order* ; and had the Kentucky statute been the same as ours, and whether it was or not, does not appear ; we cannot think the Supreme Court of the United States would have decided the variance as fatal. Upon the other grounds, to wit, the omission to state the time when, and the place where, the notes were payable, the Court seem to have predicated that decision ; these points are particularly noticed by the Court, and upon which there was sufficient ground for the decision of the Court.

In the case of *Ferguson vs. Harwood*,* a variance^{*7 Cranch 408} is held immaterial, where it does not change the *nature of* the contract, which must receive the same legal construction, whether the words be in or out of the declaration; that is clearly the case here.

The judgment must therefore be affirmed.

OLIVER *versus* ATKINSON.

The answer of a garnishee, that debtor had placed in his possession money which he believed belonged to the United States, held not sufficient, uncontroverted, to authorise a judgment.

The plaintiff in error was summoned at the instance of Atkinson, to answer what money, goods, &c. he had in his hands of one Deweese, the debtor of defendant. The plaintiff, in his answer, acknowledged himself to be in possession of certain monies, which the debtor had placed with him for safe keeping, and which he, the debtor, said (and which the garnishee believed) belonged to the United States. On this answer, uncontroverted, the Circuit Court of Dallas rendered judgment against the plaintiff, and he took a writ of error to this Court.

CLARK, for Plaintiff—GOLDTHWAITE, *contra*.

By Mr. Justice HITCHCOCK :

William Atkinson obtained a judgment in the Circuit Court of Dallas county, against A. C. Deweese, at the March term, 1832, of said Court for one hundred dollars, and on the 20th day of August following, the plaintiff made an affidavit before a Justice of the Peace, that the defendant had no property within his knowledge whereof to make the money, but that Benjamin Mott, Charles Votey, and John Oliver, were indebted to him, &c. ; upon which a summons of garnishment was issued against them. The two first answered, and admitted assets to a small amount. Oliver did not appear. On the eighth July, 1833, a notice was served on him to show cause why a judgment *nunc pro tunc*, should not be entered against

him for his default in not appearing to answer the summons; and at the fall term, 1833, of said Court, a judgment *nunc pro tunc*, was entered; upon which a *sci. fa.* issued, returnable to the Spring term, 1834, of said Court. At that term, Oliver appeared and made answer, "that in his absence from home one day, the defendant, A. C. Deweese, deposited with the wife of said Oliver \$45 in silver, of which his wife informed him on his return home the same evening; and after dark of that day, after returning home, a garnishment was served upon him. Next day he saw Deweese, and conversed with him on the subject; and he, Deweese, informed him, that the money was public money, belonging to the United States Post Office Department, and that he had deposited it with the wife of said Oliver for safe keeping until he could pay it over. The money is still in the hands of said Oliver. He states, that he knows Deweese very well: he is poor, and has little or no money, except that which he receives as Post Master at Pleasant Hill. He believes the money belongs to the United States, and he knows of no other property," &c. Upon this answer, a judgment was entered up against Oliver for forty-five dollars; to reverse which, the case has been brought here.

Several assignments were made; only one of which will be noticed, which is considered decisive of the case, (all the others are considered as waived by the appearance and answer of the garnishee,) to-wit: "that the amount for which judgment is taken, is stated to be ascertained by an answer filed by Oliver, when the facts in the answer do not authorise a judgment against the garnishee."

The statute upon which this proceeding is predicated, declares "that it shall be lawful, upon the ap-
Aik. Dig. 43

pearance and examination of the garnishee to enter up judgment, and award execution against him for all sums of money *acknowledged to be due to the defendant, from him.*"

There was certainly no admission here, by Oliver, of his indebtedness to Deweese. He states the circumstances under which the money was received, and concludes by stating his belief that the money belonged to the United States. This statement being made under oath, must be taken to be true, until controverted by the oath of the plaintiff, when an issue is to be made up and tried, as in other cases.

The judgment must therefore be reversed, and the cause remanded.

IVEY *versus* HARDY.

In suits between a white man, and a free person of color, or of mixed blood within the third degree, where the amount in controversy is under twenty dollars, and the former is sworn, the latter has also a right to the advantage of his own oath.

This was a suit before a Justice of the Peace of Pike county, commenced by the defendant in error. On appeal to the Circuit Court, the presiding Judge refused to allow the plaintiff in error the privilege of his own oath, (the amount in controversy being under twenty dollars) and on this point, he prosecuted a writ of error to this Court.

By Mr. Justice HITCHCOCK.

The question involved in this case, is, whether,

when a white man sues a free person of color or of mixed blood within the third degree, in a case under twenty dollars, and offers his own oath to establish his claim, the defendant can be permitted to be examined on oath, touching the suit, in his own defence? The Court below decided that he could not.

By an act of the Legislature^a it is declared that, "if the sum claimed be twenty dollars, or under, the Justice of the Peace may at the trial of the cause, proceed to examine the plaintiff and defendant, *on oath*, and give judgment as to him the right of the cause may appear." By an other act,^b it is declared, "that all negroes, mulattoes, Indians and all persons of mixed blood, descended from negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free; shall be taken, and deemed incapable in law, to be witnesses in any case whatever, except for and against each other."

^a Aik. Dig. 294

^b Ib. 452.

It is by virtue of the first of these recited statutes, that the defendant in error claims the benefit of his own oath against the plaintiff in error, and by virtue of the latter, that he expects to exclude the oath, which the same statute extends to the plaintiff in error.

We do not think these statutes are to be thus construed. The latter statute is restrictive of a right which would otherwise be extended to that class of persons, in common with others—must be strictly construed, and consequently, confined to cases in which they are called to testify as witnesses in the common acceptation and understanding of the term. The first statute extends a right to the plaintiff, which the Common Law does not give. It is general in its

CHAMBERLAIN, adm'r. vs. BATES adm'r.

terms: the right is secured to each party, and when the plaintiff claims the benefit of it, he must take it subject to all its conditions and consequences. It is in the nature of a summary Chancery proceeding, when the statements on oath of each party are taken, and judgment is given according "as the right of the cause may appear." To give the plaintiff the benefit of this statute, and exclude the defendant from it, under the prohibition of the other, would open a door to very great frauds, and would be subversive of every principle of justice.

The judgment must be reversed, and the cause remanded.

CHAMBERLAIN, Adm'r. *de bonis non*, versus BATES, Adm'r.

An administrator *de bonis non*, cannot sustain an action at law, against the representatives of a former administrator, to recover money received by the latter, in the course of a partial administration, and not accounted for, or paid over.

The authority of an administrator, *de bonis non*, embraces only such of the personality of the first decedent, as remains *unadministered*, i. e. *in specie*, *unaltered* or *unconverted* by his predecessor.

This case was tried in the Circuit Court of Mobile. Chamberlain administrator *de bonis non*, of the estate of one Negus, left unadministered by James P. Bates his former representative; declared in assumpsit against the defendant, administrator of Bates, to recover a sum of money alleged to have been received by the latter, while the administrator of Negus, and which had never been accounted for, or paid over. On demurrer by the defendant, the Court held the

demurrer well taken, and rendered judgment in favor of the defendant; when, by writ of error, the case came to this Court.

The only principle raised here, was as to the authority of an administrator, *de bonis non*, to sue for assets received and converted by the former deceased representative of his intestate.

By Mr. Chief-Justice SAFFOLD:

The action was *assumpsit*, brought by Chamberlain as administrator *de bonis non* of the estate of Negus, to recover of the defendant as administrator of James P. Bates, the former administrator of said Negus, a sum of money received by the latter in the course of his partial administration of said estate, and which he had failed to pay over, or otherwise to account for.

To the declaration, to this effect, was filed a general demurrer, on which the Court gave judgment for the defendant.

This judgment on demurrer is assigned as erroneous, and is the only question for revision.

This question is now for the first time presented for the consideration of this Court: it is not unimportant in principle, nor entirely free from difficulty. Yet as the argument has been brief, and *ex parte*, I will but concisely investigate a few of the prominent points necessarily involved.

The principle is sufficiently clear, that an executor or administrator, during the progress of the administration, is directly responsible to creditors, to the extent of assets received; and ultimately to the legatees or distributees for any residuum of the personalty; and consequently after the death of an executor or administrator, his executor or administrator is

payments made, imply an admission of sufficient assets.

The plaintiff, in support of his right of action, relies, as authority, upon a decision of the Supreme Court of Massachusetts, where, as he suggests, the statute provides *pro rata* payments in case of insolvency, in a manner similar to ours. It is the case of *Jewett vs. Jewett, adm'r.*^a It is true, that the remarks of Chief Justice *Parsons*, who delivered the opinion of the Court, afford some countenance to the principles insisted on in support of this action; but that case was essentially different from this, and the question originated out of an act of the Probate Court, in removing an administratrix from the trust, pending an action against her by a creditor of the intestate, which removal was by authority of a statute of that State, the special provisions of which, or how far they may have influenced the decision, do not appear. The want of assets, and this removal, were plead as matter of defence, and on demurrer, the plea was sustained. In giving the opinion, the *Chief Justice* remarked, that if the defendant had assets, she must account for them with, and pay them over to the succeeding administrator. But in support of this position he cited no authority. And in conclusion, he said, that considering the manner in which the assets of the deceased were appropriated by their law, the Court were of opinion the plaintiff could no longer sustain his action. He had, however, previously admitted, that, at *Common Law*, the defendant might retain sufficient assets for the payment of the debt against the subsequent administrator; but he proceeded on the principle, that the *Common Law* mode of marshalling the assets for the payment of debts, according to their degrees of priority, may have giv-

^a5 Mass. Rep.
275.

en a sanction to the retainer, which their statutes did not. Whatever may be the correct rule of decision respecting the right of a *removed* administrator to retain assets in such case, especially under the statute of that State, I think it may be safely assumed, that according to the Common Law, remaining unimpaired in this State, the representatives of a deceased executor or administrator may here retain a sufficiency of the *converted* assets, to satisfy all demands which were chargeable against the latter, in the fiduciary capacity during the continuance of the trust. The law and the reason may be different in the case of *removal*, which implies direliction of duty, and a consequent necessity for prompt settlement.

Such is the spirit of our statute on this subject, which has also been referred to in support of this action. It authorises the Orphan's Court, where administration has been granted on insufficient security, to require other that is sufficient: also where any administrator has embezzled, wasted, or misapplied, all, or any of the decedents, estate, or shall refuse or neglect to give bond with security as aforesaid, to forthwith revoke or repeal the letters of administration, and grant others to such person, entitled thereto, as will give the requisite bond. The subsequent administrator "may have actions of Trover, detinue, account, and on the case, for such goods or chattels as came to the possession of the former administrator, and were withheld, wasted, embezzled, detained or misapplied, by any of them, and no satisfaction made for the same." By this I would understand, that authority is given to the new administrator, immediately, to institute either, or all the actions mentioned, that may be most appropriate for any misconduct, or either of the wrongs therein specified. It is

justly to be inferred that the Legislature, by expressly prescribing these remedies, intended to confer on the subsequent administrator, more extensive powers than by the Common Law, are incident to administrators *de bonis non*; otherwise it would have been sufficient merely to have authorised the removal, and the subsequent appointment.

On the part of the defendant has been cited the case of *Coleman, adm. v. McMurdo, et al.*^a The action was by an administrator *de bonis non*, against the representatives of the former administrator, as is the case before us. The President of the Court being absent, the other Judges gave their opinions *seriatim*, at great length, and after full discussion. The decision denied the right of action, Judge Coalter alone dissenting. He also inclined to admit that the Common Law was against the right of action, but contended for the right in *Virginia*, on the ground of long usage, and the operation of statutes in that State, which the majority of the Court determined to have been repealed.

Judge Carr adopts the principle, that, if an executor dies intestate, only the personal estate, *the property whereof is not altered*, shall go to the administrator *de bonis non*, and not to the next of kin of the executor; because from the time the executor dies intestate, the first testator dies intestate also, and it was the executors own fault that he did not, as he might, alter the property.^b Again, "that every thing is unadministered, which has not been reduced into actual possession, and converted by the administrator :—" also, "that an administrator *de bonis non*, is entitled to all the goods and personal estate, such as terms for years, household goods &c., which remain *in specie*, and were not administered by the first ad-

^a 2 P. Wms. 210, 340.

ministrator : as also debts due the intestate." Such is found to be the doctrine of the Common Law.*

From these principles it results, that the authority of an administrator *de bonis non*, embraces only such of the personalty of the first decedent as remains *unadministered*, i. e. *in specie, unaltered or unconverted* by his predecessor. Hence it is, that the letters or commission of an administrator *de bonis non* is held to extend, as his title imports, to the *unadministered* assets alone, and so far only is one in that capacity to be regarded a trustee for distributees, and representatives of the testator or intestate. In the Virginia case cited, Judge *Greene* remarks, that, "No case has ever occurred in England, in which an administrator *de bonis non* has ever asserted a claim against the representatives of a deceased executor or administrator, at law or in equity, for an account of the assets wasted or converted to his own use, by the executor or administrator ; and consequently no adjudged case is to be found expressly affirming or denying the propriety of such a claim." He also draws what appears to be the just and necessary distinction between an administrator *de bonis non*, and a temporary administrator commissioned to act during the *minority, absence &c.*, of the person entitled to the general trust ; a distinction which the argument of the plaintiffs counsel in this case would have the effect to destroy. He says the commission of an administrator *de bonis non* gives him only the goods *not administered* ; "whilst in cases of an infant, executor or administrator, or where one entitled to administration, or as executor, is absent, or is obstructed by a pending suit ; whenever the impediment is removed, a general probate or administration is granted to him for the whole estate, and the administration is grant-

*Bac. Ab. title ex'rs & adms and Tangry v. Brown, 1 Bos. & Pul. 310.

ed in the mean while to the administrator *durante minori ætate or durante absentia, or pendente lite*, for the use of the executor or administrator, to whom a general probate or administration may afterwards be committed. They are only the bailees of such general executor or administrator, and therefore responsible to them." So, if administration be granted to an improper person, or by an improper Court, and afterwards revoked, the subsequent administrator properly appointed, has a general commission of the administration, and is thereby entitled to call the displaced administrator to account, as in case of an executor *de*

11 Vin. Ab. *son tort.*
117. pl. 4.

In the case of an executor or administrator, who has, for misconduct, been removed from the trust, I have already conceded that the reason, and at least our statute laws, are different; that, in such case, to a greater extent, the unfaithful or incompetent trustee may be called to an immediate account by the administrator *de bonis non*, who has been deemed more worthy the trust; that though this transfer of the assets or interest effects nothing towards the final settlement of the estate, except to render it more secure, this object alone may be a sufficient inducement for the change. Where, however, the necessity for the new appointment originates in no complaint, or distrust of the former trustee, but as a consequence of his death, no such danger is to be presumed. This being the case before us, the statute referred to, does not apply to it; nor am I convinced that all our statute regulations concerning the settlement of estates have materially changed the *policy* in respect to the question presented; if they have, the authority of the Legislature must be revoked to change the *remedy*; the judiciary is incompetent.

An other view of the subject presented by Judge *Greene*, in the case cited, is not inapplicable to our system, and tends farther to reconcile even the policy of limiting the authority of administrators *de bonis non*, as above proposed. Under this rule of practice, he says, the creditors have an immediate remedy against the executor or administrator of the predecessor, in which it is only necessary to prove a waste, or conversion, to an amount sufficient to satisfy the demand, and not to settle accurately the accounts of the administration; and without the intervention of the *administrator de bonis non*, all creditors to the extent of the fund in question, would be secured by bonds given by the legatees to the executor or administrator of the executor or administrator, to indemnify him against debts of the first testator, which may appear and be recovered against him. He alone being responsible to the creditors for the fund for which his testator or intestate was responsible, he is the proper and only proper person to whom those bonds should be given; whereas, if the administrator *de bonis non*, has a right to recover this fund, it will be burthened with two commissions instead of one, or even more than two, if there be several successive administrators *de bonis non*. The creditors would be delayed until after a tedious litigation; the accounts of the first executor or administrator were finally settled in the suit of the administrator *de bonis non*, and he had been enabled to coerce the payment of the money, and their rights would be varied as aforesaid. They might be farther delayed by the necessity of a suit against the administrator *de bonis non*; and so the legatees and distributees would also be delayed, not only by the first suit by the administrator *de bonis non*, but by their suit against him for a settlement of

his accounts; and the hazard of loss to creditors, legatees and distributees, would be doubled, trebled or quadrupled, according as there were one or more successive administrators *de bonis non*, from the possible, and indeed common insolvency of executors and administrators, and their securities.

The opinions of the majority of the Court, in the case cited of *Coleman, adm. v. McMurdo*, resulted in the conclusion, that, an administrator *de bonis non*, can not sue the representative of a former executor or administrator, either at law or in equity, for assets wasted or converted by the first executor or administrator; but such suit may be brought directly by creditors, legatees or distributees.

The opinion of this Court sustains the same principle, in reference to the Common Law and statutes of this State.

The judgment of the Circuit Court must therefore be affirmed.

INDEX.

ABATEMENT.		Page.
1. While a mere entry or statement of the name of a case, and of the counsel prosecuting and defending it, not shewn by whom made, (not being such an entry of appearance as is required by the rules of Court,) or the giving of a replevy bond, (in an action of detinue,) or the filing of a plea in abatement to the writ; are not, in either case, such an appearance as will waive the right of an objection to an abateable defect in the writ: Yet, a plea to such defect, to be available, must appear to have been submitted at the proper time, in the proper place, and in the mode prescribed by the statute.— <i>Nabors vs. Nabors.</i>		163
2. A plea, commencing with matter of abatement, and concluding in bar, is defective and bad, on demurrer.— <i>Rogers & Sons vs. Smiley & Griffin.</i>		249
3. And where a plea in abatement was filed after several continuances, and after a demurrer had been considered, and the general issue pleaded, the Court refused to extend a demurrer to the plea, back to a supposed defect in the declaration.— <i>Id.</i>		249
ACCOUNT.		
1. The balance of an open account, (originally for more than fifty dollars, but reduced below that amount by credits,) is recoverable before a Justice's Court. <i>Baird vs. Nichols.</i>		186
2. Interest is recoverable on an open account for goods sold and delivered, where, by express stipulation, the account is to be considered as due at a particular day.— <i>Moore vs. Patton, Donagan & Co.</i>		451
3. Interest held recoverable on an open account, on the common counts in assumpsit, where the defendant agreed to pay interest, and promised to give bills in discharge of the debt.— <i>Id.</i>		451
ACKNOWLEDGMENT OF DEEDS...Vide Deeds.		
ACTION.		
1. Where there is a joint interest existing in a contract, and one of the parties dies, before action is commenced, such action must be brought in the name of the survivor; and a failure to set out in the declaration the contract, as it existed, and to shew the interest of the plaintiff to be as survivor, is error.— <i>Callison v. Little</i>		89
2. In an action of trespass, assault and battery, against several, the jury, upon executing a writ of inquiry, must find a joint verdict against all the defendants, and cannot assess separate damages.— <i>Callison, et al. vs. Lemons.</i>		145
3. In actions against officers, for failure to return process at a particular day, the Courts are privileged to hear any matter of equity in excuse for the failure—And where the amount involved is under twenty dollars, such excuse may be shewn by the oath of the officer.— <i>Starnes & Co. vs. Pierce.</i>		227
4. A suit cannot be legally commenced upon a promissory note, on the same day on which it becomes due.— <i>Randolph vs. Cook & Ellis.</i>		236
5. That, suit is brought on a cause of action, before the same is past due, is available in error, even after appearance and judgment by <i>nisi dicat.</i> — <i>Id.</i>		286
6. The holder of an instrument, (transferred as conditional payment or collateral security) is not bound first to sue thereon—or to offer to, or return the same; in order to maintain an action on the original debt or consideration, intended to be secured by such instrument.— <i>Trotter vs. Crockett.</i>		401
7. Where paper securities have been transferred as an absolute payment of a pre-existing debt, then no resort can be had on such debt, or its original consideration—and the party receiving the same must take his recourse on the paper so transferred—(unless indeed they be forged, or fraud be committed in the representation of their value.)— <i>Id.</i>		401

ACTION.

8. But if the transfer of paper be intended merely as a conditional payment, or as a collateral security, the successful pursuit of the original debt, will depend on the fact, whether or not *laches* has been committed by the holder, whereby any liability on it has been lost to the party transferring it.—*Id.* 401
9. Detinue, lies by the mortgagee, to recover possession of personal property mortgaged, after the time for the redemption of the mortgage, has expired. *Hopkins vs. Thompson.* 433
10. The acts of 1828 '29, requiring the indorsee of a paper to sue the maker thereof to the first Court after due, &c. do not embrace a case, where the maker removes beyond the jurisdiction of the Courts of this State, and so remains during the period when he might be legally sued—*Woodcock vs. Campbell.* 456
11. In such case, it is not necessary to charge the indorser, that the party should go beyond the State to find the maker.—*Id.* 456
12. Interest, under our statute, authorising its recovery by way of damages, is substituted for damages, at Common Law.—*McWhorter vs. Standifer.* 519
13. And, *semble*—that if in an action of debt, no damages are laid in the declaration, yet a recovery may be had of the interest.—*Id.* 519
14. It is not error, that in an action of debt, or assumpsit, to recover the amount of any writing, (embraced in the statutes, authorising the calculation of interest by way of damages, for the detention of money up to the time of the rendition of judgment) that more interest by way of damages for the detention, is adjudged by the Court, than is demanded in the declaration: provided it appears, that no more has been adjudged by way of interest, than is recoverable, by law, upon the debt, as shewn to be due, and unpaid, by the record.—*Id.* 519
15. Suit cannot be maintained against the surety of an administrator, on the administration bond; where it does not appear, that a judgment has been rendered regularly against the administrator as such.—*Faulk vs. Judge County Court of Monroe.* 538
16. An administrator *de bonis non*, cannot sustain an action at law, against the representatives of a former administrator, to recover money received by the latter, in the course of a partial administration, and not accounted for, or paid over.—*Chamberlain adm'r. vs. Bates adm'r.* 550

ALIEN.

1. After an indictment has been found against a prisoner, and the same has been filed and accepted in Court, he cannot except to the personal qualifications of the persons, selected, summoned and sworn on the grand jury, or plead in bar or avoidance of that indictment, that one of the jurors who preferred it is an alien.—*Boylington vs. The State.* 100

AMBIGUITY.

1. When there is no ambiguity apparent on the face of an instrument—nor any intimation given of a disclosure of a *latent ambiguity*, the refusal of an inferior Court, to admit parol testimony to explain such instrument, is not error.—*Johnson vs. Ballew.* 20

APPEARANCE.

1. While a mere entry or statement of the name of a case, and of the counsel prosecuting and defending it, not shewn by whom made, (not being such an entry of appearance as is required by the rules of Court,) or the giving of a replevy bond, (in an action of detinue,) or the filing of a plea in abatement to the writ; are not, in either case, such an appearance as will waive the right of an objection to an abateable defect in the writ: Yet, a plea to such defect, to be available, must appear to have been submitted at the proper time, in the proper place, and in the mode prescribed by the statute.—*Nabors vs. Nabors.* 108

ASSIGNMENT.

1. A and W entered into a covenant, whereby A, after acknowledging himself indebted to W, assigned to him certain bonds. One T also signed the covenant, (as attorney for W) which was drawn to answer as a receipt from T, and also as an assignment of the bonds. In an action by W's executors upon

the covenant—Held, 1st. That the *negligence* of W in collecting the assigned bonds, was not in issue under the plea of "*covenant performed*." 2d. That T. was a competent witness to shew the result of his efforts to collect the bonds.

Aldridge vs. Warner's executors.

2. The indorsement of a promissory note is the highest evidence of the nature of the agreement between the parties; and evidence of a parol agreement made at the time, varying the legal liability, is inadmissible.—*Hightower vs. Ivy.* 92
3. Proof of the insolvency of the maker of a note, at the the time of its assignment, will not excuse the assignee from the use of due diligence to collect it from such maker.—*Ib.* 306
4. Where the maker of a note, after suit brought by the assignee, offers to pay said assignee part of the money, and he refuses to receive it, and it cannot afterwards be recovered, it is negligence on the part of such assignee, and he must, to that extent, sustain the loss.—*Ib.* 306
5. It is competent for a defendant to show by testimony, that an instrument assigned as a conditional payment or collateral security of a pre-existing debt; was good and available in the hands of the plaintiff, at the time of assignment and afterwards.—*Trotter vs. Crockett.* 306
6. The holder of an instrument, (transferred as conditional payment or collateral security) is not bound first to sue thereon,—or to offer to, or return the same; in order to maintain an action on the original debt or consideration, intended to be secured by such instrument.—*Ib.* 401
7. Where paper securities have been transferred as an *absolute payment* of a pre-existing debt, then no resort can be had on such debt, or its original consideration—and the party receiving the same must take his recourse on the paper so transferred—(unless indeed they be forged, or fraud be committed in the representation of their value.)—*Ib.* 401
8. But if the transfer of paper be intended merely as a conditional payment, or as a collateral security, the successful pursuit of the original debt, will depend on the fact, whether or not *laches* has been committed by the holder, whereby any liability on it has been lost to the party transferring it.—*Ib.* 401
9. In order to charge the assignor of a bond, (on a contract of indorsement made prior to the passage of the act of 1832, subjecting bonds payable in Bank, to the Law Merchant,) held, not necessary that demand should have been made at the Bank where the instrument was made payable.—*Woodcock vs. Campbell.* 456
10. The acts of 1828 '29, requiring the indorsee of a paper to sue the maker thereof to the first Court after due, &c. do not embrace a case, where the maker removes beyond the jurisdiction of the Courts of this State, and so remains during the period when he might be legally sued.—*Ib.* 456
11. In such case, it is not necessary to charge the indorser, that the party should go beyond the State to find the maker.—*Ib.* 456

ASSUMPSIT.

1. An obligation or agreement signed between two or more parties, concluding "Given under our hands and seals," and containing a seal after the name of the first signer, (the other signing immediately under it,) is a *sealed instrument*, and assumpsit is not maintainable thereon.—*Hatch vs. Crawford.* 54
2. A and B bound themselves by a *sealed agreement* to abide the award of certain others chosen by themselves, in a controversy between them; and that whatever amount was found against either should be paid in *debts due to the party found debtor*.—Held,—*Horton vs. Ronalds.* 79
3. That where A on the balance found against B commenced an original attachment, and obtained judgment by default, without a jury, as an *indebitatus assumpsit*, for the amount in money, such judgment was erroneous, and that A had not resorted to the proper action.—*Ib.* 79
4. Interest held recoverable on an open account, on the common counts in assumpsit, where the defendant agreed to pay interest, and promised to give bills in discharge of the debt.—*Moore vs. Patton, Donegan & Co.* 451
5. It is not error, that in an action of debt, or assumpsit, to recover the amount of any writing, (embraced in the statutes, authorising the calculation of interest by way of damages, for the detention of money up to the time of the rendition of judgment) that more interest by way of damages for the detention, is

adjudged by the Court, than is demanded in the declaration: provided, it appears, that no more has been adjudged by way of interest, than is recoverable, by law, upon the debt, as shewn to be due, and unpaid by the record.—*M Whorter vs. Standifer.*

519

ATTACHMENT.

1. The bond, authorised by statute, on the replevy of property taken in attachment, must be payable to the sheriff not to the plaintiff in the attachment.
Seacull vs. Franklin, et al.

493

ATTACHMENT.

2. But where a sheriff, having attached the goods of A, at the suit of B, delivered them to C, and D, who did not appear to be the agents, attorneys or factors of the defendant in the attachment, or acting under his authority; and took their bond, payable to B, conditioned, for the return of the goods to the said sheriff, or for the payment of such judgment as might be had in the attachment cause: in debt brought upon the bond by B, held—that the bond was not recoverable, either as a statute, or Common Law obligation.—*Ib.*

493

ATTORNEY.

1. An attorney at law, is only liable for gross negligence; which is a question of fact, to be determined by the jury.—*Evans vs. Watrous.*
2. An averment in a declaration, against an attorney for negligence, that he had negligently commenced a suit, and improperly dismissed it, contrary to his duty, &c.—held, to be a sufficient charge of gross negligence, to put the defendant, upon his plea.—*Ib.*

205

205

AWARD.

1. A and B bound themselves by a sealed agreement to abide the award of certain others chosen by themselves, in a controversy between them; and that whatever amount was found against either should be paid in debts due to the party found debtor.—Held.
Horton vs. Ronalds
2. That where A on the balance found against B commenced an original attachment, and obtained judgment by default, without a jury, as in *indebitatus assumpsit*, for the amount in money, such judgment was erroneous, and that A had not resorted to the proper action.—*Ib.*

79

79

BANK.

1. The notice authorised by the 9th section of the act of incorporation of the Branch of the Bank of the State of Alabama at Montgomery, to a maker or indorser of a bill or note, need not be under the corporation seal.—*Bank vs. Harrison.*
2. The summary proceeding authorised against the debtors of such Bank, though different from the Common Law course, is yet remedial in its character, and if substantially pursued will not be defeated by mere technicalities.—*Ib.*

540

540

BANK NOTES.

1. Payment, in discharge of a debt, in genuine Bank Notes, if made *bona fide*, and in ignorance of the failure of the Bank, is a valid payment; though at the time, the notes might be valueless.—*Lowrey vs. Murrell.*

220

BARRON AND FEME.

1. A deed to a *feme covert*, and the heirs of her body, implying the creation of an estate tail in personal property, vests in her such absolute estate, as will be subject to the disposal of the husband, and liable for his debts.—*Harkins vs. Coalter.*
2. Equity will give effect to the terms of a deed, conveying property to a *feme covert* for her exclusive use, even where no trustee is nominated, and will regard the husband a trustee, so far as to enforce a compliance with the intentions of the donor. But the intention to create a trust estate for the wife must distinctly appear.—*Ib.*
3. Where a deed of personal property, conveying the same to the wife, stipulated that the property was given for the joint use, behoof and support of the husband and wife, and subject to their joint possession; the Court held the deed not to

463

463

create a separate and distinct estate for the wife, in exclusion of the husband's marital rights; but subject to his debts.—*Ib.* 463

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A suit cannot be legally commenced upon a promissory note, on the same day on which it becomes due.—*Randolph vs. Cook & Ellis.* 286
2. The indorsement of a promissory note is the highest evidence of the nature of the agreement between the parties; and evidence of a parol agreement made at the time, varying the legal liability, is inadmissible.—*Hightower vs. Iry.* 308
3. Proof of the insolvency of the maker of a note, at the time of its assignment, will not excuse the assignee from the use of due diligence to collect it from such maker.—*Ib.* 308
4. Where the maker of a note, after suit brought by the assignee, offers to pay said assignee part of the money, and he refuses to receive it, and it cannot afterwards be recovered, it is negligence on the part of such assignee, and he must, to that extent sustain the loss.—*Ib.* 308
5. As a general rule, an indorser of a note or bill, is incompetent in respect to his interest, as a witness in favor of a subsequent endorsee, to charge any part to the instrument whose liability is anterior to his own.—*Kennon vs. McRae.* 389
6. The acts of 1828 '29, requiring the indorsee of a paper to sue the maker thereof to the first Court after due, &c. do not embrace a case, where the maker removes beyond the jurisdiction of the Courts of this State, and so remains during the period when he might be legally sued.—*Woodcock vs. Campbell.* 456
7. In such case, it is not necessary to charge the indorser, that the party should go beyond the State to find the maker.—*Ib.* 456
8. The notice authorised by the 9th section of the act of incorporation of the Branch of the Bank of the State of Alabama at Montgomery, to a maker or indorser of a bill or note, need not be under the corporation seal.—*Bank vs. Harrison.* 540
9. Where, in an action, by the indorsee of a note against the maker, the declaration described it as payable to A. B. or order, and the note was payable alone to A. B.—held to be an immaterial variance.—*Harrison vs. Weaver.* 542

BOND.

1. Sealing is an essential requisite to constitute a perfect bond, and an instrument purporting to be a certiorari bond, but containing no seals, is void.—*Skinner vs. McCarty.* 19
2. In order to charge the assignor of a bond, (on a contract of indorsement made prior to the passage of the act of 1832, subjecting bonds payable in Bank, to the Law Merchant,) held, not necessary that demand should have been made at the Bank where the instrument was made payable.—*Woodcock vs. Campbell.* 456
3. The bond, authorised by statute, on the replevy of property taken in attachment, must be payable to the sheriff not to the plaintiff in the attachment.
Seicall vs. Franklin, et al. 493
4. Bonds voluntarily executed to civil officers, in relation to judicial proceedings, though invalid as statute bonds, may, if they contain valid and sufficient consideration, be available as Common Law bonds.—*Ib.* 493
5. But where a sheriff, having attached the goods of A, at the suit of B, delivered them to C, and D, who did not appear to be the agents, attorneys or factors of the defendant in the attachment, or acting under his authority; and took their bond, payable to B, conditioned, for the return of the goods to the said sheriff, or for the payment of such judgment as might be had in the attachment cause: in debt brought upon the bond by B, held—that the bond was not recoverable, either as a statute, or Common Law obligation.—*Ib.* 493

BRIDGES.

1. The Legislature has the same right to authorise the erection of toll bridges, by act incorporating a company for that purpose, which it has vested in the County Courts.—*Dyer vs. Tuscaloosa Bridge Company.* 296

BRIDGES.

2. The keeper of a ferry, opposite a town, under license from the County Court, keeps it subject to the public convenience; and the erection of a toll bridge near such ferry, by a Company, under charter from the Legislature, is not a violation of the vested rights of such ferry owner.—*Ib.* 296
3. The principle, that private property cannot be subjected to public use, without adequate compensation, does not apply to alleged losses, sustained by the owner of a ferry, (over a public water course, opposite a town, and who holds the same under grant from the County Court) by reason of the erection near it of a toll bridge, under a charter, granted by the Legislature.—*Ib.* 296
4. The Legislature, in an act incorporating a Bridge Company, having provided a mode for assessing the damages which might be sustained by the owner of any land, selected as a scite and as a road to and from said bridge—such mode is conclusive, and the proprietor of land, so appropriated, must resort to the means pointed out by the statute, for compensation.—*Ib.* 296

CAUSE OF ACTION.

1. That, suit is brought on a cause of action, before the same is past due, is available in error, even after appearance and judgment by *nil dicit*.—*Randolph vs. Cook & Ellis.* 286

CERTIORARI BOND.

1. Sealing is an essential requisite to constitute a perfect bond, and an instrument purporting to be a certiorari bond, but containing no seals, is void.—*Skinner vs. McCarty.* 19

CERTIFICATE.

1. The certificate of a presiding Judge, to the record of another State, that the clerk attesting the record, was clerk at the date of his the Judge's certificate, and that the attestation was in proper form; held to be a sufficient compliance with the provisions of the act of Congress regulating the authentication of records.—*Merrivether vs. Garvin.* 199
2. It is not essential, that the Judge's certificate should state, that the clerk attesting the record, was clerk, at the date of attestation.—*Ib.* 199
3. The duplicate receipt of the Receiver of public monies (on an entry of public lands) is, before the issuance of the patent thereon,—sufficient evidence of title to authorise the *bona fide* holder of the same, to maintain the action of trespass to try title.—*Bullock vs. Wilson.* 436

CHANCERY.

1. Where executions are issued against personal property, which has been claimed by a third person, under the statute, and before the trial of the rights is determined, other executions are issued upon the same judgment, and levied upon the same property—an injunction will lie to restrain proceedings on the latter.—*Huntington vs. Bell.* 51
2. Where the allegations of a bill in chancery, were, *that a slave had been conveyed, with an agreement to allow the privilege of redeeming or repurchasing, to the party conveying,* and the conveyance was on its face, absolute, (the subscribing witness to which, was not produced, nor his absence accounted for,) and there was no positive testimony rebutting the implicit *denial of a defeasance*, by the answer; and a lapse of twenty six years had ensued, without excuse for the delay, the Court refused to disturb the sale.—*Hatfield vs. Montgomery.* 58
3. The assignee of such person making the conveyance, held, not to be a competent witness, to prove the defeasance.—*Ib.* 58
4. In the case of a mortgage, as in other deeds, in which fraud is alleged to have been committed, a party is not entitled to an unlimited time for the prosecution of his rights, *after his knowledge* of the existence of those rights, and of the fraud—but in such case, *after an unreasonable delay*, the law will presume a *payment or discharge of the equity*.—*Ib.* 58
5. It is a rule of practice in equity, that a bill may be dismissed, *on motion*, at any time, for want of equity.—*Haughy vs. Strang.* 177
6. Where Courts of Law and Equity have concurrent jurisdiction of a matter of defence, and a defendant elects to defend at law, and fails, he will not be per-

CHANCERY.

- mitted afterwards to apply to chancery, unless such failure has resulted from unavoidable accident.—*Ib.* 177
7. The refusal, of a Common Law Judge, to grant a new trial, in a case adjudged before him, and where all the facts were properly cognizable, is not a good cause for an application to chancery.—*Ib.* 177
8. It is an inflexible rule, that chancery will not relieve against a judgment, where a party has been heard at law, unless he were ignorant of facts pending the suit, or those facts were such as could not have been received, as a defence at law.—*Thomas & Harris vs. Hearn, et al.* 262
9. Where facts and circumstances, available as a defence at law, have been omitted to be relied on, or where those matters have been passed upon by a Court of competent authority, and no steps have been taken to correct an erroneous decision of such Court, in relation to them; chancery will not interfere.—*Ib.* 262
10. Where two or three joint owners of a mill, were compelled to pay a judgment at law, on account of the joint property, the Court of Chancery, (under the circumstances, to save litigation, its jurisdiction being concurrent,) entertained a bill, and compelled the third joint owner, to contribute his proportion of the said judgment.—*Ib.* 262
11. Where a case in Chancery can be completely decided, between parties; the circumstance, that an interest exists in another person, whom the process of the Court can not reach, will not prevent a decree upon the merits.—*Marr's ex'or, vs. Southwick, Cannon & Warren.* 351
12. A suit against the representative of an estate, for the purpose of subjecting the assets of a deceased partner, to the payment of a judgment obtained against the firm; is a new and distinct proceeding, against a new party; and all the facts must be established by testimony, in the ordinary manner.—*Id.* 351
13. Thus, the judgment obtained against a firm, in such case, is not proper evidence, nor can the depositions taken in the Common Law suit, be read as testimony against an executor, in a Chancery cause, to compel payment out of the estate of the firm debt.—*Id.* 851
14. Where a judgment, having been obtained at law in this State, against a firm, the creditor, residing abroad, filed a bill in Chancery against the representative of the estate of one of the partners, to subject the assets of the estate to the payment of the judgment—held, that an admission, that one of the firm resided in New Orleans, and was solvent, was fatal to the Chancery case; for this was an admission of a complete and adequate remedy at law, which should have been pursued, before resorting to equity for relief, against the estate of the deceased partner.—*Id.* 351
15. The refusal of a Chancellor to dismiss a bill, for want of security for costs, is not a ground for reversing a decree in equity—excuses for a non-compliance with the letter of the statute, being necessarily, subject to the discretion of the Court.—*May and May, ex'ors, vs. Eastin.* 414
16. In determining between an absolute sale and a mortgage, the Court will take the intention of the parties, from a view of all the circumstances: and where it is evident that a *prima facie* absolute sale, was intended as a pledge, the Court will relieve against the sale, and suffer a redemption.—*Id.* 414
17. Where A, having slaves levied on under execution, in favor of the Tombeckbee Bank, and being about to discharge the same by payment of the notes of that Bank, was hindered from so doing by the representations of B, that it would not be a good payment, but who, on an agreement with A, paid off the execution in the same money, and took a purchase of one of the slaves. (with a condition of redemption in three months:) the Court, on a bill filed after the expiration of three months, held the transaction a mortgage, and decreed restitution, on the payment by A, of one half the nominal value of the Tombeckbee Bank notes, paid by B, in discharge of the execution.—*Id.* 414
18. The general rule that a mortgagor, seeking to redeem, must pay costs, does not apply to a case; where the mortgagee sets up an absolute title in himself.—*Id.* 414
19. Equity will give effect to the terms of a deed, conveying property to a *feme covert* for her exclusive use, even where no trustee is nominated, and will regard the husband a trustee, so far as to enforce a compliance with the intentions of the donor. But the intention to create a trust estate for the wife must distinctly appear.—*Harkins, et al. vs. Coalter, et al.* 463

CHANCERY.

20. Where a deed of personal property, conveying the same to the wife, stipulated that the property was given for the *joint use, behoof and support of the husband and wife, and subject to their joint possession*; the Court held the deed not to create a separate and distinct estate for the wife, in exclusion of the husband's marital rights; but subject to his debts.—*Id.* 463
21. Where a commissioner, appointed by the Governor, to rent the University lands, had collected rents which he had never reported, it was held, that a bill for discovery, and account, was properly cognizable in equity, and that the suit was well brought in the name of the Governor—also, that there being an evident default in the non-payment of the money collected as rents, the Chancellor properly decreed interest on the account.—*Bullock vs. The Governor, &c.* 484
22. Bill filed to foreclose a mortgage on real estate, against several contending parties (whose rights doubtful) dismissed on grounds,—1st. That the mortgage secured other property, sufficient to meet the mortgage debt. 2d. That one of the defendants having died *pendente lite*, and his representatives being materially interested, no steps had been taken to make them parties.—*Koger vs. Weakly, et al.* 516
23. The decision of Chancery, upon the facts of a case, are conclusive against all parties, suing under the same facts afterwards.—*McWhorter vs. Standifer.* 519
24. If a receipt in discharge of a right has been executed voluntarily and with a proper understanding, and there is no proof of fraud, mistake, or ignorance of the rights of the party executing it; the presumption in favor of its validity, must prevail.—*Caldwell vs. Gilles and ux.* 526
25. Where it appeared that a receipt, charged to have been procured fraudulently, was the motive which induced the defendant to distribute an estate to the advantage of the complainant, and at the risk of injury to the defendant; and there was no proof of fraud in procuring the receipt, the Court refused to determine the receipt void and inoperative.—*Id.* 526
26. The answer of a defendant, to a bill, filed for the discovery of testimony in aid of a trial at Common Law, may be used, by the plaintiff on that trial, or not, and if used, any other evidence consistent with the issue, is not thereby precluded. *Cox, et ux. vs. Cox.* 533

CHEROKEE NATION.

1. The act of 1820, extending the jurisdiction of the Circuit Court of Cotaco (now Morgan) County, &c. to all the tract of country belonging to the Cherokee Indians; vested in the Circuit Court, the jurisdiction only, of crimes and misdemeanors committed within those tracts of Indian country; and did not extend thereto, the civil jurisdiction of Justices of the Peace, in cases of forcible entry and detainer.—*Thomas vs. Adams.* 188
2. The act of 1832, extending the jurisdiction of the State over the Cherokee Nation, is not entitled to a retroactive operation, so as to authorise proceedings for a forcible entry committed on lands in the Indian nation, prior to the passage of that act.—*Ib.* 188

COLLATERAL SECURITY.

1. It is competent for a defendant to show by testimony, that an instrument assigned as a conditional payment or collateral security of a pre-existing debt; was good and available in the hands of the plaintiff, at the time of assignment and afterwards.—*Trotter vs. Crockett.* 401
2. The holder of an instrument, (transferred as conditional payment or collateral security) is not bound first to sue thereon,—or to offer to, or return the same; in order to maintain an action on the original debt or consideration, intended to be secured by such instrument.—*Ib.* 401
3. Where paper securities have been transferred as an *absolute payment* of a pre-existing debt, then no resort can be had on such debt, or its original consideration—and the party receiving the same must take his recourse on the paper so transferred—(unless indeed they be forged, or fraud be committed in the representation of their value.)—*Ib.* 401
4. But if the transfer of paper be intended merely as a conditional payment, or as a collateral security, the successful pursuit of the original debt, will depend on the fact, whether or not *laches* has been committed by the holder, whereby any liability on it has been lost to the party transferring it.—*Ib.* 401

CONTRACT.

1. A discontinuance against a party not served with process, who is a *joint contractor*, (in a contract not embraced by the act of 1818) is error.—*Tindall vs. Collins, Survivor.* 17
2. The act of 1818, authorising a discontinuance where the writ is returned, "not found," as to one or more of the defendants, does *not* embrace the case of a *co defendant to a joint contract in writing*, (not under seal) *for the performance of work and labor.*—*Ib.* 17
3. Executors or administrators, by virtue of their general powers as such, cannot make any contract in their representative character, which at law, will bind the estate, and authorise a judgment *de bonis testatoris.*—*Mc Eldery and Chapman vs. McKenzie.* 33
4. If an executor or administrator contracts for necessary matters relating to an estate, he does so on his personal responsibility, and the action to recover thereon, must be against him individually.—*Ib.*
5. Where there is a joint interest existing in a contract, and one of the parties dies, before action is commenced, such action must be brought in the name of the survivor; and a failure to set out in the declaration the contract, *as it existed*, and to shew the interest of the plaintiff *to be as survivor*, is error.—*Callison v. Little.* 69
6. Interest may be charged on an open account, when the contract stipulates for a certain period of credit; but the law does not permit rests to be made in such account every six or twelve months, re.stating the account at each time, and converting interest into principal; and no custom or agreement to that effect can alter the law.—*Mars ex'or. vs. Southwick Cannon & Warren.* 351
7. Where there is a subsisting contract in writing, between parties adequate to determine their rights, and under which work has been completed, it will not be permitted for one of those parties, to set up a new parol agreement, without consideration, varying the first, and changing its terms and conditions.—*Randolph vs. Perry.* 376
8. Where, in an action, by the indorsee of a note against the maker, the declaration described it as payable to *A. B.* or order, and the note was payable alone to *A. B.*—held to be an immaterial variance.—*Harrison vs. Weaver.* 542
9. A variance in the description of a contract, which must be construed the same, whether the variance exist or not, not changing its nature; will not be regarded.—*Ib.* 542

CORPORATION.

1. The books of a Corporation, are evidence against the Corporation, and between the members thereof, but not in their favor, in a suit brought against the body, by a stranger.—*Mayor and Aldermen Tuscaloosa vs. Wright.* 230
2. *Ex-members* of a town corporation, are *ex necessitate*, competent witnesses in a suit by a stranger, against the body.—*Ib.* 230

COUNTY COURT.

1. The "*County Court*," acting judicially, has no authority to take the acknowledgement of a deed of lands: and where the acknowledgment of a deed appeared to have been taken in *open Court*, and the entry thereof was transferred from the minutes to the back of the deed, by the clerk, it was held, that such acknowledgment was void.—*Munn & Griffin vs. Lewis.* 24
2. The *Judge or Clerk* of the County Court have authority to take such acknowledgments; but they are independent ministerial acts, which the officer before whom made, must certify on the back of the deed.—*Ib.* 24

COURTS INFERIOR.

1. The judgment of an inferior Court, on a matter submitted for its inspection, will not be reviewed, unless a bill of exceptions, making that matter part of the case, and bringing it to the view of the appellate Court, has been regularly taken.—*Turk vs. Smith & Co.* 155
2. The Supreme Court will not review the discretionary power of an inferior Court, in granting or withholding new trials.—*Malone & Lake vs. Eastin & Gayle.* 182
3. Where part of the term of a Court was held by one Judge, and part by another, held, that the latter was not precluded from considering a motion for a new trial, in a cause adjudged by the former.—*Ib.* 182

COURTS, INFERIOR.

4. The Supreme Court has no power to control the discretion of inferior Courts, in regulating pleadings, allowing amendments and filing additional pleas; but, this must be understood to be confined to such pleas as are consistent with each other, and with the regular order of pleading.—*Tate vs. Gilbert.*
5. That an inferior Court allowed a defendant to withdraw the plea of general issue, and to substitute other pleas in bar of the action; is not error.—*Id.*

386

386

COVENANT.

1. A and W entered into a covenant, whereby A, after acknowledging himself indebted to W, assigned to him certain bonds. One T also signed the covenant, (as attorney for W) which was drawn to answer as a receipt from T, and also as an assignment of the bonds. In an action by W's executors upon the covenant—Held, 1st. That the negligence of W in collecting the assigned bonds, was not in issue under the plea of "covenant performed." 2d. That T. was a competent witness to shew the result of his efforts to collect the bonds.—*Aldridge vs. Warner's executors.*

92

COSTS.

1. The statute of 1807, restricting the charge for attendance, in any bill of costs, of more than two witnesses to any one fact, must be understood, to mean such facts as are material, and which may necessarily arise in the progress of a cause, either incidentally, collaterally, or directly upon the issue, and it seems, not to have been the intention, to disallow the attendance of witnesses to the successful party, where, from the course of the adversary, or the decision of the Court, the evidence of such witnesses (otherwise proper) has been superseded, or dispensed with.—*Randolph vs. Perry.*
2. The refusal of a Chancellor to dismiss a bill, for want of security for costs, is not a ground for reversing a decree in equity—excuses for a non-compliance with the letter of the statute, being necessarily, subject to the discretion of the Court.—*May & May, ex'rs. vs. Eastin.*
3. The general rule, that a mortgagor, seeking to redeem, must pay costs, does not apply to a case, where the mortgagee sets up an absolute title in himself.—*Id.*

376

414

414

DAMAGES.

1. In an action of trespass, assault and battery, against several, the jury, upon executing a writ of inquiry, must find a joint verdict against all the defendants, and cannot assess separate damages.—*Callison et al. vs. Lemons.*
2. Although it is error, that judgment should be entered for a greater amount than that claimed in the declaration, yet, judgment will not be reversed as to mere technical divisions of the separate amounts of debt and damages, when the aggregate amount of such judgment, is less, than the aggregate sum laid in the declaration.—*Boardman vs. Poland.*
3. In the action of trespass to try title, damages for the detention of the premises, as well as possession, are recoverable.—*Avent vs. Read.*
4. Interest, under our statute, authorising its recovery by way of damages, is substituted for damages, at Common Law.—*McWhorter vs. Standifer.*
5. And, *semble*—that if in an action of debt, no damages are laid in the declaration, yet a recovery may be had of the interest.—*Id.*
6. It is not error, that in an action of debt, or assumpsit, to recover the amount of any writing, (embraced in the statutes, authorising the calculation of interest by way of damages, for the detention of money up to the time of the rendition of judgment) that more interest by way of damages for the detention, is adjudged by the Court, than is demanded in the declaration: provided, it appears, that no more has been adjudged by way of interest, than is recoverable, by law, upon the debt, as shewn to be due, and unpaid by the record.—*Id.*

145

431

480

519

519

519

DEBT.

1. Where the record of a judgment rendered in another state, was in the following words, "for the sum of two hundred and twenty dollars debt, which may be

discharged by the payment of one hundred and ten dollars," &c.—*Held*.—
1. That debt was a proper action for the recovery of the claim.—2. That in an action to recover the amount due on the judgment, it was not error to declare for the conditional sum of one hundred and ten dollars.

- Carter vs. Crews.* 81
2. Debt, suggesting a *devastavit*, is maintainable, on a judgment by default obtained against the representatives of an estate; either before, or after the issuance of a *fi. fa.*—*Burke vs. Adkins.* 236
3. *Semble*—that if in an action of debt, no damages are laid in the declaration, yet a recovery may be had of the interest.—*McWhorter vs. Standifer.* 519
4. It is not error, that in an action of debt, or assumpsit, to recover the amount of any writing, (embraced in the statutes, authorising the calculation of interest by way of damages, for the detention of money up to the time of the rendition of judgment) that more interest by way of damages for the detention, is adjudged by the Court, than is demanded in the declaration: provided, it appears, that no more has been adjudged by way of interest, than is recoverable, by law, upon the debt, as shewn to be due, and unpaid, by the record.—*Id.* 519

DEEDS.

1. The "County Court," acting judicially, has no authority to take the acknowledgment of a deed of lands: and where the acknowledgment of a deed appeared to have been taken in *open Court*, and the entry thereof was transferred from the minutes to the back of the deed, by the clerk, it was held, that such acknowledgment was void.—*Munn & Griffin vs. Lewis.* 24
2. The Judge or Clerk of the County Court have authority to take such acknowledgments; but they are independent ministerial acts, which the officer before whom made, must certify on the back of the deed.—*Id.* 24

DEFEASANCE.

1. In cases, where the absence of a subscribing witness to a deed is not accounted for, secondary evidence is not admissible, to prove the existence of such deed, or any defeasance connected therewith.—*Hatfield vs. Montgomery.* 58
2. Where the allegations of a bill in chancery, were, that a slave had been conveyed, with an agreement to allow the privilege of redeeming or repurchasing, to the party conveying, and the conveyance was on its face, absolute, (the subscribing witness to which, was not produced, nor his absence accounted for,) and there was no positive testimony rebutting the implicit denial of a defeasance, by the answer; and a lapse of twenty six years had ensued, without excuse for the delay, the Court refused to disturb the sale.—*Id.* 58
3. The assignee of such person making the conveyance, held, not to be a competent witness, to prove the defeasance.—*Id.* 58

DENURRER.

1. The omission to make profert of letters of guardianship, can only be taken advantage of by demurrer.—*Suitzer vs. Guardians of Holloway.* 88
2. Objection to the time of filing a plea, is waived by a demurrer thereto.—*Callison vs. Lemons.* 145
3. Where, in a declaration, in trespass *vi et armis*, the time of committing the trespass was left blank, held, that the defect was one, cured by the statute of amendments, and not available on demurrer.—*Estill vs. Shelly.* 185
4. Whether a defect, existing in the indorsement of a writ, is available on demurrer, where a party has cravedoyer, and filled that demurrer in time: or, whether there may not be a proper case for demurrer, after a judgment by default—*Quere.*—*Burford vs. Cunningham, et al.* 244
5. But, after a judgment by default, a party will not be permitted by demurrer, to evade that rule of practice, which prohibits all dilatory pleas without the consent of the adversary, after the time for filing those pleas has expired.—*Id.* 244
6. A plea, commencing with matter of abatement, and concluding in bar, is defective and bad, on demurrer.—*Rogers & Sons vs. Smiley & Griffin.* 249
7. As a general rule, a demurrer opens the whole pleadings in a cause, to the con-

sideration of the Court, and will be extended to the first substantial defect existing therein; but this is always upon the supposition, that the pleadings have been properly filed—in due time, and perfect order.—*Id.*

8. And where a plea in abatement was filed after several continuances, and after a demurrer had been considered, and the general issue pleaded, the Court refused to extend a demurrer to the plea, back to a supposed defect in the declaration.—*Id.*

249

249

DEMURRER TO EVIDENCE.

1. Whether it is or not discretionary with a Court to compel a party to join in a demurrer to evidence—*Quere.* But, on demurrer to evidence, the party must admit the facts and conclusions which may be reasonably inferred therefrom, otherwise the adverse party is not bound to join in the demurrer.—*Saenger vs. Fitts.*

9

DEPOSITIONS.

1. In an action against several copartners, on a copartnership debt, the notice authorised by the statute of 1807, providing for taking the depositions of a witness, about to leave the State, is good, if only served upon one partner.—*Cox, et al. vs. Cox.*
2. Where a commission, to take the testimony of a non-resident witness, appeared to have regularly issued, the Court held it not error, that the witness, being temporarily within the State, was examined here, and his interrogatories taken by the commissioner.—*Id.*

533

533

DETINUE.

1. Detinue, lies by the mortgagee, to recover possession of personal property mortgaged, after the time for the redemption of the mortgage, has expired.
Hopkins vs. Thompson.

433

DEVASTAVIT.

1. Debt, suggesting a *devastavit*, is maintainable, on a judgment by default, obtained against the representatives of an estate; either before, or after the issuance of a *f. fa.*—*Burke vs. Adkins.*
2. Suit cannot be maintained against the surety of an administrator, on the administration bond; where it does not appear, that a judgment has been rendered regularly against the administrator, as such.—*Fault vs. Judge of the County Court of Monroe.*

236

538

DISCONTINUANCE:

1. A discontinuance against a party not served with process, who is a *joint contractor*, (in a contract not embraced by the act of 1818) is error.—*Tindall vs. Collins.*
2. The act of 1818, authorising a discontinuance where the writ is returned, "not found," as to one or more of the defendants, does not embrace the case of a *co-defendant to a joint contract in writing*, (not under seal,) *for the performance of work and labor.*—*Id.*
3. The statute of *Joseph's* does not cure the error of such a discontinuance—especially if the issue below was not on the *merits.*—*Id.*
4. Where A and B, being sued on a note before a Justice of the Peace, A appeared, and on oath denied the execution of the instrument, and judgment was rendered against B, who did not appear, but who carried the case by *certiorari*, into the County Court: *Held*, that filing declaration against B alone, did not create a discontinuance.—*Skinner vs. McCarty.*

17

17

17

19

DURESS.

1. It is not competent for a witness to give testimony as to *Whether, a particular language used was calculated to produce fear in the mind of one, so as to induce him to execute a paper.* *What that language was*, must be submitted to the jury, from which their own inferences are to be drawn.—*Johnson vs. Ballou.*

20

EJECTMENT.

1. The general rule, that a defendant in ejectment may be permitted to set up an

outstanding title in another, and that the landlord may defend the action by being made a co-defendant—does not apply in an action by a purchaser at a sheriff's sale, to recover possession.—*Avent vs. Read.* 480

ERROR, AND WRIT, OF

1. Where there is a joint interest existing in a contract, and one of the parties dies, before action is commenced, such action must be brought in the name of the survivor; and a failure to set out in the declaration the contract, as it existed, and to shew the interest of the plaintiff to be as survivor, is error.—*Callison vs. Little.* 89
2. That, suit is brought on a cause of action, before the same is past due, is available in error, even after appearance and judgment by *nil dicit*.—*Randolph vs. Cook & Ellis.* 286
3. A discontinuance against a party not served with process, who is a joint contractor, (in a contract not embraced by the act of 1818) is error.—*Tindall vs. Collins, Survivor.* 17
4. Where, after a judgment for defendant, on unlawful detainer, a Justice, (after three days consideration) granted a new trial to plaintiff, and gave a new judgment, without notice to defendant; held to be error.—*Barr vs. White.* 342
5. That an inferior Court allowed a defendant to withdraw the plea of general issue, and to substitute other pleas in bar of the action; is not error.—*Tate vs. Gilbert.* 386
6. It is definitely settled, that the Supreme Court will not look to the indorsement of a writ, for the purpose of finding error, to reverse a judgment.—*Boardman vs. Poland.* 431
7. Although it is error, that judgment should be entered for a greater amount than that claimed in the declaration, yet, judgment will not be reversed as to mere technical divisions of the separate amounts of debt and damages, when the aggregate amount of such judgment, is less, than the aggregate sum laid in the declaration.—*Boardman vs. Poland.* 431

ESTATE.

1. An unexpired term of years, is a sufficient estate to support a proceeding for forcible entry and detainer.—*Mead vs. Daniel, et al.* 86
2. A deed to a *feme covert*, and the heirs of her body, implying the creation of an estate tail in personal property, vests in her such absolute estate, as will be subject to the disposal of the husband, and liable for his debts.—*Harkins, et al vs. Coalter, et al.* 463
3. Equity will give effect to the terms of a deed, conveying property to a *feme covert* for her exclusive use, even where no trustee is nominated, and will regard the husband a trustee, so far as to enforce a compliance with the intentions of the donor. But the intention to create a trust estate for the wife must distinctly appear.—*Id.* 463
4. Where a deed of personal property, conveying the same to the wife, stipulated that the property was given for the joint use, behoof and support of the husband and wife, and subject to their joint possession; the Court held the deed not to create a separate and distinct estate for the wife, in exclusion of the husband's marital rights; but subject to his debts.—*Id.* 463

ESTATE TAIL.

1. A deed to a *feme covert*, and the heirs of her body, implying the creation of an estate tail in personal property, vests in her such absolute estate, as will be subject to the disposal of the husband, and liable for his debts.—*Harkins, et al. vs. Coalter, et al.* 463

EVIDENCE.

1. Whether it is or not discretionary with a Court to compel a party to join in a demurrer to evidence *Quere.* But, on demurrer to evidence, the party must admit the facts and conclusions which may be reasonably inferred therefrom, otherwise the adverse party is not bound to join in the demurrer.—*Surger vs. Fitts.* 9

EVIDENCE.

2. It is not competent for a witness to give testimony as to *Whether, a particular language used was calculated to produce fear in the mind of one, so as to induce him to execute a paper.* What that language was, must be submitted to the jury, from which their own inferences are to be drawn.—*Johnson vs. Balles.* 29
3. In cases, where the absence of a subscribing witness to a deed is not accounted for, secondary evidence is not admissible, to prove the existence of such deed, or any defeasance connected therewith.—*Hatfield vs. Montgomery.* 56
4. Where the allegations of a bill in chancery, were, *that a slave had been conveyed, with an agreement to allow the privilege of redeeming or repurchasing, to the party conveying,* and the conveyance was on its face, absolute, (the subscribing witness to which, was not produced, nor his absence accounted for,) and there was no positive testimony rebutting the implicit *denial of a defeasance*, by the answer; and a lapse of twenty six years had ensued, without excuse for the delay, the Court refused to disturb the sale.—*Ib.* 58
5. The assignee of such person making the conveyance, held, not to be a competent witness, to prove the defeasance.—*Ib.* 58
6. In a proceeding before a Justice for forcible entry and detainer, the law does not require the justice to record and certify all the evidence before him. It is only necessary to record and certify such as is admitted after objection, or rejected when offered.—*Mead vs. Daniel, et al.* 66
7. The books of a Corporation, are evidence against the Corporation, and between the members thereof, but not in their favor, in a suit brought against the body, by a stranger.—*Mayor and Aldermen Tuscaloosa vs. Wright.* 230
8. Ex-members of a town corporation, are *ex necessitate*, competent witnesses in a suit by a stranger, against the body.—*Ib.* 230
9. The indorsement of a promissory note is the highest evidence of the nature of the agreement between the parties; and evidence of a parol agreement made at the time, varying the legal liability, is inadmissible.—*Higlowser vs. Ivy.* 308
10. A suit against the representative of an estate for the purpose of subjecting the assets of a deceased partner, to the payment of a judgment obtained against the firm; is a new and distinct proceeding, against a new party; and all the facts must be established by testimony, in the ordinary manner.—*Marris ex'z vs. Southwick, Cannon & Warren.* 351
11. Thus, the judgment obtained against a firm, in such case, is not proper evidence, nor can the depositions taken in the Common Law suit, be read as testimony against an executor, in a Chancery cause, to compel payment out of the estate, of the firm debt.—*Ib.* 351
12. In regard to the incompetency of a witness, a distinction exists, as to an interest in the question, and an interest in the event of the suit; and a witness will not be held incompetent to testify, unless it appear, that he is to gain or lose by the event of the suit: and any objection as to his interest in the question, goes to his credibility.—*Kennon vs. McRae.* 389
13. As a general rule, an indorser of a note or bill, is incompetent in respect to his interest, as a witness in favor of a subsequent endorsee, to charge any party to the instrument whose liability is anterior to his own.—*Ib.* 389
14. A release entered on the minutes of the Court, (not signed, sealed or delivered to the witness, and implying a mere discharge as to the interest in the particular action,) is not sufficient to authorise an incompetent witness to give testimony.—*Ib.* 389
15. The duplicate receipt of the Receiver of public monies (on an entry of public lands) is, before the issuance of the patent thereon, sufficient evidence of title to authorise the bona fide holder of the same, to maintain the action of trespass to try title.—*Ballock vs. Wilson.* 436
16. It is competent for a defendant to show by testimony, that an instrument assigned as a conditional payment or collateral security of a pre-existing debt; was good and available in the hands of the plaintiff, at the time of assignment and afterwards.—*Trotter vs. Crockett.* 401
17. In an action against several copartners, on a copartnership debt, the notice authorised by the statute of 1807, providing for taking the depositions of a witness, about to leave the State, is good, if only served upon one partner.—*Cox, et al. vs. Cox.* 533

EVIDENCE.

18. Where a commission, to take the testimony of a non-resident witness, appeared to have regularly issued, the Court held it not error, that the witness, being temporarily within the State, was examined here, and his interrogatories taken by the commissioner.—*Id.* 533
19. The answer of a defendant, to a bill, filed for the discovery of testimony in aid of a trial at Common Law, may be used, by the plaintiff on that trial, or not, and if used, any other evidence consistent with the issue, is not thereby precluded.—*Id.* 533
20. In suits between a white man, and a free person of color, or of mixed blood within the third degree, where the amount in controversy is under twenty dollars, and the former is sworn, the latter has also a right to the advantage of his own oath.—*Ivey vs. Hardy.* 548

EXCEPTIONS, BILL OF

1. A bill of exceptions must show affirmatively the existence of the error, of which a party complains, and the appellate Court will not presume facts which do not appear.—*Johnson vs. Ballew.* 29
2. The judgment of an inferior Court, on a matter submitted for its inspection, will not be reviewed, unless a bill of exceptions, making that matter part of the case, and bringing it to the view of the appellate Court, has been regularly taken.—*Turk vs. Smith & Co.* 155
3. A notice of set-off, is no part of the record, and any errors in the proof relating to it, must be shewn by bill of exceptions.—*Pledger vs. Glover.* 174

EXECUTORS AND ADMINISTRATORS.

1. Executors or administrators, by virtue of their general powers as such, cannot make any contract in their representative character, which at law, will bind the estate, and authorise a judgment *de bonis testatoris*.—*Mc Eldery and Chapman vs. McKenzie.* 33
2. If an executor or administrator contracts for necessary matters relating to an estate, he does so on his personal responsibility, and the action to recover thereon, must be against him individually.—*Id.* 33
3. *Seemle*—The effect of the act of 1806, which prohibits any action from being brought against an executor or administrator within six months from the time of proving the will or granting letters of administration—should be, to suspend for that time, the running of the statute of limitations.—*Hutchison versus. Tolls.* 44
4. Where, in an action brought against an executor, to recover a debt due by his testator, a replication to a plea of the statute of limitations only alleged that *letters testamentary were not granted to the executor until more than two years after the testator's decease*—Held: That this replication was bad, and was no bar to the plea; because, only averring that letters testamentary were not granted for so long a period, left the legal presumption uncontradicted, that letters of one kind or another, had been previously issued.—*Id.* 44
5. Where it appeared, that a demand against an estate had not been presented within eighteen months after the grant of letters testamentary, but, that, the demand had accrued after that period; held,— 44
6. That the demand was not precluded or barred under the statute of non-claim, as that statute does not commence running until the claim has accrued, or the party has a right to sue.—*Nnal vs. Cummings ex'rs.* 171
7. Debt, suggesting a *deceitum*, is maintainable, on a judgment by default obtained against the representatives of an estate; either before, or after the issuance of a *fi. fa.*—*Burke vs. Adkins.* 236
8. A *scire facias* against executors or administrators, to shew cause why execution, *de bonis propriis* should not issue, (after a judgment by default against the estate,) is not allowable on the bare return of *nulla bona*, to an execution *de bonis testatoris*.—*Bani: vs. Hooks & Davis.* 271
9. The Orphan's Court, in this State, has jurisdiction in a case of administration, where the truth of an inventory is contested; and may try and decide the question, whether, or not, certain property belongs to the estate.—*Dobbs vs. distributees of Cockerham.* 328

EXECUTORS AND ADMINISTRATORS.

10. In settling a contest of this kind, the Orphans' Court has authority to summon a jury to determine questions of fact, on which the parties interested may be at issue.—*Ib.* 325
11. Where, in such a case, it is decided that certain property, not embraced in the inventory, belongs to the estate, the Court has power to direct a division of such property among the distributees; or if that cannot be done, a public sale of the property should be ordered, as provided for by the statute, and the proceeds of such sale should be divided, and it is error for the Court at once to give judgment against the administrator in cash, in favor of the distributees, for the value of the property as assessed by the jury.—*Ib.* 328
12. The jurisdiction extended to the County Court in cases of this character, does not deprive parties of their remedy by action on the bond, or by bill in Chancery.—*Ib.* 328
13. A suit against the representative of an estate, for the purpose of subjecting the assets of a deceased partner, to the payment of a judgment obtained against the firm; is a new and distinct proceeding, against a new party; and all the facts must be established by testimony, in the ordinary manner.—*Marrs ex'z vs. Southwick, Cannon & Warren.* 351
14. Thus, the judgment obtained against a firm, in such case, is not proper evidence, nor can the depositions taken in the Common Law suit, be read as testimony against an executor, in a Chancery cause, to compel payment out of the estate of the firm debt.—*Ib.* 351
15. Where a judgment, having been obtained at law in this State, against a firm; the creditor, residing abroad filed a bill in Chancery against the representative of the estate of one of the partners, to subject the assets of the estate to the payment of the judgment—held, that an admission, that one of the firm resided in New Orleans, and was solvent, was fatal to the Chancery case; for this was an admission of a complete and adequate remedy at law, which should have been pursued, before resorting to equity for relief, against the estate of the deceased partner.—*Ib.* 351
16. Suit cannot be maintained against the surety of an administrator, on the administration bond; where it does not appear, that a judgment has been rendered regularly against the administrator, as such.—*Faulk vs. Judge of the County Court of Monroe.* 538
17. An administrator *de bonis non*, cannot sustain an action at law, against the representatives of a former administrator, to recover money received by the latter, in the course of a partial administration, and not accounted for, or paid over.—*Chamberlain vs. Bates.* 550
18. The authority of an administrator, *de bonis non*, embraces only such of the personality of the first decedent, as remains *unadministered*, i. e. *in specie, unaltered or unconverted* by his predecessor.—*Ib.* 550

EXECUTION.

1. Where executions are issued against personal property, which has been claimed by a third person, under the statute, and before the trial of the right is determined other executions are issued upon the same judgment, and levied upon the same property—an injunction will lie to restrain proceedings on the latter.—*Huntington vs. Bell.* 51
2. A *scire facias* against executors or administrators, to shew cause why execution, *de bonis propriis* should not issue, (after a judgment by default against the estate,) is not allowable on the bare return of a *nulla bona*, to an execution *de bonis testatoris*.—*Bank vs. Hook & Davis.* 271
3. When a sheriff sells property upon an execution, which is encumbered by a deed of trust, on which a sum of money is to fall due some months after the sale, the sheriff cannot legally adjust the trust debt, of his own authority, by paying the money to become due upon it, out of the proceeds of the sale.—*Baylor vs. Scott.* 315
4. The plaintiff in execution—not the sheriff—is entitled to the benefit of a trust deed on paying off the debt secured by it; and the trustee will be bound to execute the trust.—*Ib.* 315
5. The act of 1807, giving a defendant in execution a summary remedy against a sheriff for failing to pay over an excess collected by him on such execution,

provides that such defendant shall have the same remedy that plaintiffs in execution are entitled to against a sheriff, for failing to pay over money collected; but that act must not be so construed as to extend to defendants in execution the remedies provided for plaintiffs in execution, by subsequent statutes, whereby the limitation as to the time of commencing the proceeding is omitted, the time of notice abridged, and the penalty increased.—*Ib.*

6. The act of 1807, is to be construed with reference to laws then in existence.—*Ib.* 315 315

FEME COVERT.

1. A deed to a *feme covert*, and the heirs of her body, implying the creation of an *estate tail* in personal property, vests in her such absolute estate, as will be subject to the disposal of the husband, and liable for his debts.—*Harkins et al. vs. Coalter, et al.* 463
2. Equity will give effect to the terms of a deed, conveying property to a *feme covert* for her exclusive use, even where no trustee is nominated, and will regard the husband a trustee, so far as to enforce a compliance with the intentions of the donor. But the intention to create a trust estate for the wife must distinctly appear.—*Ib.* 463
3. Where a deed of personal property, conveying the same to the wife, stipulated that the property was given for the *joint use, behoof and support of the husband and wife, and subject to their joint possession*; the Court held the deed not to create a separate and distinct estate for the wife, in exclusion of the husband's marital rights; but subject to his debts.—*Ib.* 463

FERRY AND RATE OF FERRIAGE.

1. One who crosses a river at a ferry in a boat not belonging to the owner of the ferry, and who lands by stepping from the ferryman's boat, is not liable in an action to recover the rate of ferriage, allowed by law; however he would be responsible for the invasion of the plaintiff's franchise, or for trespass.—*Henry vs. Turner.* 23
2. The keeper of a ferry, opposite a town, under license from the County Court, keeps it subject to the public convenience; and the erection of a toll bridge near such ferry, by a Company, under charter from the Legislature, is not a violation of the vested rights of such ferry owner.—*Dyer vs. Tuscaloosa Bridge Company.* 296
3. The principle, that private property can not be subjected to public use, without adequate compensation, does not apply to alleged losses, sustained by the owner of a ferry, (over a public water course, opposite a town, and who holds the same under grant from the County Court) by reason of the erection near it of a toll bridge, under a charter, granted by the Legislature.—*Ib.* 296

FORCIBLE ENTRY AND DETAINER.

1. The complaint of a party, in a proceeding before a justice for Forcible entry and Detainer, need not specify the land by statutory demarkations of section, township, and range: any description by metes and bounds, and objects of notoriety in the neighborhood, is sufficient.—*Mcad vs. Daniel et al.* 86
2. In a proceeding before a Justice for forcible entry and detainer, the law does not require the justice to record and certify all the evidence before him. It is only necessary to record and certify such as is admitted after objection, or rejected when offered.—*Ib.* 86
3. An unexpired term of years, is a sufficient estate to support a proceeding for forcible entry and detainer.—*Ib.* 86
4. In proceedings before Justices of the Peace, in cases of *forcible entry and detainer*, a party is entitled to the peremptory challenge of a juror, as in civil cases, in the Circuit or County Courts.—*Johnson & Wash vs. Christian & Goyms.* 201
5. Whether in a proceeding before a Justice of the Peace for forcible entry and detainer, the Justice has the discretionary power of granting a new trial on merits.—*Quare.*—*Barr vs. White* 342
6. Where, after a judgment for defendant, on unlawful detainer, a Justice, (after three days consideration) granted a new trial to plaintiff, and gave a new judgment, without notice to defendant; held to be error.—*ib.* 342

FRAUD.

1. Where one falsely and fraudulently representing himself to be the agent of others, prosecuted a variety of legal proceedings against A and T, and thereby induced them to execute their note, as a compromise.—held—That this was the case of a fraud, growing directly out of an immoral act, connected with, and depending upon it: and that a plea, alleging these facts, was a good and available defence to an action brought to recover the amount of the note.—*Ayres & Ayres & Tarrant.*

157

FREEHOLDER.

1. Under the act of 1807, exempting freeholders from suit out of the county of their permanent residence; it is not required, that the residence and freehold should be in the same county.—*Moore Baker vs. Coker.*
2. The words "permanent residence" and "residence," as used in that statute, are equivalent in signification.—*Id.*

347

347

GARNISHEE.

1. The answer of a garnishee, that debtor had placed in his possession money which he believed belonged to the United States, held not sufficient, uncontroverted, to authorise a judgment.—*Oliver vs. Atkinson.*

546

GRAND JURY.

1. After an indictment has been found against a prisoner, and the same has been filed and accepted in Court, he cannot except to the personal qualifications of the persons, selected, summoned and sworn on the grand jury, or plead in bar or avoidance of that indictment, that one of the jurors who preferred it is an alien.—*Boyington vs. The State.*

100

INDICTMENT.

1. After an indictment has been found against a prisoner, and the same has been filed and accepted in Court, he cannot except to the personal qualifications of the persons, selected, summoned and sworn on the grand jury, or plead in bar or avoidance of that indictment, that one of the jurors who preferred it is an alien.—*Boyington vs. The State.*

100

INDIAN LANDS.

1. The act of 1820, extending the jurisdiction of the Circuit Court of Cotaco (now Morgan) County, &c. to all the tract of country belonging to the Cherokee Indians; vested in the Circuit Court, the jurisdiction only, of crimes and misdemeanors committed within those tracts of Indian country, and did not extend thereto, the civil jurisdiction of Justices of the Peace, in cases of forcible entry and detainer.—*Thomas vs. Adams.*
2. The act of 1832, extending the jurisdiction of the State over the Cherokee Nation, is not entitled to a retroactive operation, so as to authorise proceedings for a forcible entry committed on lands in the Indian nation, prior to the passage of that act.—*Id.*

188

188

INDORSER AND INDORSEE.

1. As a general rule, an indorser of a note or bill, is incompetent in respect to his interest, as a witness in favor of a subsequent endorsee, to charge any party to the instrument whose liability is anterior to his own.—*Kannon vs. McRae.*
2. The acts of 1828 '29, requiring the indorsee of a paper to sue the maker thereof to the first Court after due, &c. do not embrace a case, where the maker removes beyond the jurisdiction of the Courts of this State, and so remains during the period when he might be legally sued.—*Woodcock vs. Campbell.*
- 3 In such case, it is not necessary to charge the indorser, that the party should go beyond the State to find the maker.—*Id.*
4. The notice authorised by the 9th section of the act of incorporation of the Branch of the Bank of the State of Alabama at Montgomery, to a maker or indorser of a bill or note, need not be under the corporation seal.—*Bank vs. Harrison.*

369

456

455

540

INDORSER AND INDORSEE.

5. Where, in an action, by the indorsee of a note against the maker, the declaration described it as payable to *A. B.* or order, and the note was payable alone to *A. B.*—held to be an immaterial variance.—*Harrison vs. Weaver.* 543

INDORSEMENT—see also "ASSIGNMENT."

1. The indorsement of a promissory note is the highest evidence of the nature of the agreement between the parties; and evidence of a parol agreement made at the time, varying the legal liability, is inadmissible.—*Hightower vs. Ivy.* 308
2. In order to charge the assignor of a bond, (on a contract of indorsement made prior to the passage of the act of 1832, subjecting bonds payable in Bank, to the Law Merchant,) held, not necessary that demand should have been made at the Bank where the instrument was made payable.—*Woodcock vs. Campbell.* 456

INJUNCTION.

1. Where executions are issued against personal property, which has been claimed by a third person, under the statute, and before the trial of the right is determined other executions are issued upon the same judgment, and levied upon the same property—an injunction will lie to restrain proceedings on the latter —*Huntington vs. Bell.* 51

INSOLVENCY.

1. Proof of the insolvency of the maker of a note, at the time of its assignment, will not excuse the assignee from the use of due diligence to collect it from such maker.—*Hightower vs. Ivey.* 308
2. A judicial insolvency can only be established by an exhaustion of all the means supplied by law against the purse of a debtor: and the insolvency of a party will not be presumed on the bare return of *nulla bona*, to a *fiat facias* issued against his effects.—*Trotter vs. Crockett.* 401

INTEREST.

1. The rate of interest in any one of the United States, is not a matter which the Courts *ex officio*, can notice, but is a question of fact, to be ascertained by a jury. —*Richardson vs. Williams.* 239
2. Interest may be charged on an open account, when the contract stipulates for a certain period of credit; but the law does not permit rests to be made in such account every six or twelve months, re.stating the account at each time, and converting interest into principal; and no custom or agreement to that effect can alter the law.—*Mars ex'x, vs. Southwick Cannon & Warren.* 351
3. Interest is recoverable on an open account for goods sold and delivered, where, by express stipulation, the account is to be considered as due at a particular day.—*Moore vs. Patton, Donagan & Co.* 451
4. Interest held recoverable on an open account, on the common counts in *assumpsit*, where the defendant agreed to pay interest, and promised to give bills in discharge of the debt.—*Id.* 451
5. Interest, under our statute, authorising its recovery by way of damages, is substituted for damages, at Common Law.—*McWhorter vs. Standifer.* 519
6. And, *semble*—that if in an action of debt, no damages are laid in the declaration, yet a recovery may be had of the interest.—*Id.* 519
7. It is not error, that in an action of debt, or *assumpsit*, to recover the amount of any writing, (embraced in the statutes, authorising the calculation of interest by way of damages, for the detention of money up to the time of the rendition of judgment) that more interest by way of damages for the detention, is adjudged by the Court, than is demanded in the declaration: provided, it appears, that no more has been adjudged by way of interest, than is recoverable, by law, upon the debt, as shewn to be due, and unpaid by the record.—*Id.* 519

INVENTORY.

1. The Orphan's Court, in this State, has jurisdiction in a case of administration, where the truth of an inventory is contested; and may try and decide the question, whether, or not, certain property belongs to the estate.—*Dobbs vs. distributors of Cockerham.* 328

JURISDICTION.

2. In settling a contest of this kind, the Orphans' Court has authority to summon a jury to determine questions of fact, on which the parties interested may be at issue.—*Id.* 329
3. Where, in such a case, it is decided that certain property, not embraced in the inventory, belongs to the estate, the Court has power to direct a division of such property among the distributees; or if that cannot be done, a public sale of the property should be ordered, as provided for by the statute, and the proceeds of such sale should be divided, and it is error for the Court at once to give judgment against the administrator in cash, in favor of the distributees, for the value of the property as assessed by the jury.—*Id.* 328
4. The jurisdiction extended to the County Court in cases of this character, does not deprive parties of their remedy by action on the bond, or by bill in chancery.—*Id.* 328

JOEFAILS AND AMENDMENTS.

1. Where, in a declaration, in trespass *vi et armis*, the time of committing the trespass was left blank, held, that the defect was one, cured by the statute of amendments, and not available on demurrer.—*Estill vs. Shelley.* 135

JOINT CONTRACT.

1. Where there is a joint interest existing in a contract, and one of the parties dies, before action is commenced, such action must be brought in the name of the survivor; and a failure to set out in the declaration the contract, *as it existed*, and to shew the interest of the plaintiff to be as survivor, is error.—*Callison v. Little.* 89
2. A discontinuance against a party not served with process, who is a *joint contractor*, (in a contract not embraced by the act of 1818) is error.—*Tindall vs. Collins.* 17
3. The act of 1818, authorising a discontinuance where the writ is returned, "not found," as to one or more of the defendants, does not embrace the case of a co-defendant to a joint contract in writing, (not under seal,) for the performance of work and labor.—*Id.* 17

JUDGMENT.

1. Where the record of a judgment rendered in another state, was in the following words, "for the sum of two hundred and twenty dollars debt, which may be discharged by the payment of one hundred and ten dollars," &c.—*Held, Ist.* That debt was a proper action for the recovery of the claim. 2d. That in an action to recover the amount due on the judgment, it was not error to declare for the conditional sum of one hundred and ten dollars.—*Carter vs. Crews.* 81
2. It is definitely settled, that the Supreme Court will not look to the indorsement of a writ, for the purpose of finding error, to reverse a judgment.—*Boardman vs. Poland.* 431
3. In an action by partners, on a partnership demand, a judgment, obtained against one of the firm, by the defendant, is not available as an off-set.—*Pierce & Baldwin, use, &c. vs. Hickenburg.* 196
4. Although it is error, that judgment should be entered for a greater amount than that claimed in the declaration, yet, judgment will not be reversed as to mere technical divisions of the separate amounts of debt and damages, when the aggregate amount of such judgment, is less, than the aggregate sum laid in the declaration.—*Boardman vs. Poland.* 431

JURISDICTION.

1. A plea, to an action of trespass, assault and battery, that the assault and battery were committed beyond the jurisdiction of the Court, is not available.—*Callison vs. Lemons.* 145
2. A plea, alleging that the defendants were served with process out of the county of B, in the Cherokee nation, held bad, without the further averment, that the defendants were not residents of the county of B—as by the act of 1818, process was authorised to be served in Indian lands, upon any one, resident of the county, from which issued.—*Id.* 145

JURISDICTION.

3. The act of 1820, extending the jurisdiction of the Circuit Court of Colaco (now Morgan) County, &c. to all the tract of country belonging to the Cherokee Indians; vested in the Circuit Court, the jurisdiction only of crimes and misdemeanors committed within those tracts of Indian country; and did not extend thereto, the civil jurisdiction of Justices of the Peace, in cases of forcible entry and detainer.—*Thomas vs. Adams.* 188
4. The act of 1832, extending the jurisdiction of the State over the Cherokee Nation, is not entitled to a retroactive operation, so as to authorise proceedings for a forcible entry committed on lands in the Indian nation, prior to the passage of that act.—*Id.* 183

JURY AND JUROR.

1. In an action of trespass, assault and battery, against several, the jury, upon executing a writ of inquiry, must find a joint verdict against all the defendants, and cannot assess separate damages.—*Callison et al. vs. Lemons.* 145
2. The finding of a jury, in determining mutual demands between a plaintiff and defendant, "that they find the plaintiff indebted to the defendant in the sum of two dollars and forty cents, over and above the plaintiffs demand in this behalf," is good. *Pledger vs. Glover* 174
3. A notice of set-off, is no part of the record, and any errors in the proof relating to it, must be shewn by bill of exceptions.—*Id.* 174
4. In proceedings before Justices of the Peace, in cases of forcible entry and detainer, a party is entitled to the peremptory challenge of a juror, as in civil cases, in the Circuit or County Courts.—*Johnson & Wash vs. Christian & Goyne.* 201
5. The rate of interest in any one of the United States, is not a matter which the Courts *ex officio*, can notice, but is a question of fact, to be ascertained by a jury.—*Richardson vs. Williams.* 239
6. The question, whether a transaction was intended as a mortgage or as an absolute sale, is one of fact, for the determination of a jury.—*Hopkins vs. Thompson.* 433

JUSTICES COURTS.

1. Cases carried from Justices Courts into the Circuit or County Courts, by *certiorari* or appeal, are triable *de novo* on their merits and equity; and a payment made after the rendition of a judgment by a magistrate, is available, without a special plea *placet durrein contraria vice*—*Hagen vs. Thompson.* 48
2. The complaint of a party, in a proceeding before a justice for Forcible entry and Detainer, need not specify the land by statutory demarcations of section, township, and range; any description by metes and bounds, and objects of notoriety in the neighborhood, is sufficient.—*Mead vs. Daniel.* 86
3. In such proceeding, the law does not require the Justice to record and certify all the evidence before him. It is only necessary to record and certify such as is admitted after objection, or rejected when offered.—*Id.* 86
4. An unexpired term of years, is a sufficient estate to support this proceeding.—*Id.* 86
5. The balance of an open account (originally for more than fifty dollars, but reduced below that amount by credit,) is recoverable before a Justice's Court. *Baird vs. Nichols.* 186
6. In proceedings before Justices of the Peace, in cases of forcible entry and detainer, a party is entitled to the peremptory challenge of a juror, as in civil cases, in the Circuit or County Courts.—*Johnson & Wash vs. Christian & Goyne.* 231
7. Whether in a proceeding before a Justice of the Peace for forcible entry and detainer, the Justice has the discretionary power of granting a new trial on merits.—*Quare.*—*Larr vs. White.* 342
8. Where, after a judgment for defendant, on unlawful detainer, a Justice, (after three days consideration) granted a new trial to plaintiff, and gave a new judgment, without notice to defendant; held to be error.—*Id.* 342

LANDS, AND CONVEYANCE OF

1. The United States, in providing for the survey of the public domain, established the rule, that sections of land should be held to contain the exact quantity returned by the Surveyor-General; so, that the corners of sections fixed by such survey, can not be removed.—*Walters vs. Cammans.* 38

LANDS, AND CONVEYANCE OF

2. In the case of *sections*, the government has arranged their boundaries, marked their lines and corners, and declared the contents; and the purchaser of an *entire section* takes all within those limits, be it more or less than the quantity returned by the surveyor; but in the purchase of a *less* quantity than a *section*, (as between the several holders of a section) the contents of such several parts must be determined by reference to the *entire section*: and the purchaser of a half or quarter section, is entitled to one-half or one-fourth of whatever the section contains. In such case the half mile posts or corners are to be placed equi-distant between the corners of a section; for these half mile posts are not definitively fixed by law, as in the case of section corners....*ib.* 35
3. The complaint of a party, in a proceeding before a justice for forcible entry and detainer, need not specify the land by statutory demarkations of *section*, *township*, and *range*: any description by metes and bounds, and objects of *notoriety* in the neighborhood, is sufficient....*Mead v. Daniel, et al.* 36
3. The act of Congress of 29th May, 1830, granting pre-emptions to settlers on public lands, having expressly inhibited all assignments and transfers of the right of pre-emption, prior to the issuance of the patent; a power, executed with authority to convey land entered under that act, when the patent should issue, was held to be but a circuitous evasion of the act of Congress, and consequently, void, and that a title obtained under such power, was illegal and imperitive. *Semble*—that the principle would not necessarily be the same, if, a bond, conditioned to make titles to the land, had been executed, and ratified by an execution of the conveyance, after the patent had issued; the latter would have constituted a new contract...although the penalty of the bond itself, or damages for its breach, might not have been recoverable...*McElroy v. Hayer* 148
4. The duplicate receipt of the Receiver of public monies (on an entry of public lands) is, before the issuance of the patent thereon, sufficient evidence of title to authorise the *bona fide* holder of the same, to maintain the action of trespass to try title.—*Bullock vs. Wilson.* 435

LANDLORD AND TENANT.

1. The general rule, that a defendant in ejectment may be permitted to set up an outstanding title in another, and that the landlord may defend the action by being made a co-defendant—does not apply in an action by a purchaser at a sheriff's sale, to recover possession.—*Arent vs. Read.* 489
2. In an action of trespass, to try title, brought by the purchaser of land at a sheriff's sale, against the defendant in execution, to recover possession, the latter can shew title in another....*ib.* 490

LEGISLATURE.

1. The Legislature has, the same right to authorise the erection of toll bridges, by act incorporating a company for that purpose, which it has vested in the County Courts.—*Dyer vs. Tuscaloosa Bridge Company.* 296
2. The Legislature, in an act incorporating a Bridge Company, having provided a mode for assessing the damages which might be sustained by the owner of any land, selected as a site and as a road to and from said bridge—such mode is conclusive, and the proprietor of land, so appropriated, must resort to the means pointed out by the statute, for compensation *ib.* 296
3. *Semble*:—The authority, under an act of the Legislature to erect a mill on such water course, must be exercised with reference to the rule, *sic utere tuo, ut alienum non laedas*.—*Bullock vs. Wilson.* 436

LETTERS OF GUARDIANSHIP.

1. If, in a suit by guardians, it is omitted in the declaration to make profert of the letters of guardianship, such defect is cured by a verdict.—*Scitzer vs. Guardians of Hollaway.* 88
2. The omission to make profert of letters of guardianship, can only be taken advantage of by demurrer.—*ib.* 88

LIMITATIONS, STATUTE OF

1. *Semble*.—The effect of the act of 1806, which prohibits any action from being brought against an executor or administrator within six months from the time

of proving the will or granting letters of administration—should be, to suspend for that time, the running of the statute of limitations.—*Hutchison versus Tolls.*

2. Where, in an action brought against an executor, to recover a debt due by his testator, a replication to a plea of the statute of limitations only alleged that letters testamentary were not granted to the executor until more than two years after the testator's decease—Held: That this replication was bad, and was no bar to the plea; because, only averring that letters testamentary were not granted for so long a period, left the legal presumption uncontradicted, that letters of one kind or another, had been previously issued.—*Id.*
3. Though the account of a plaintiff exhibit no charge against a defendant within six years, yet an item in the defendant's account, within that period, takes the case without the statute of limitations, of six years.—*Marrs ex'ix vs. Southwick, Cannon & Warren.*

44

44

351

MASTER AND SERVANT.

1. The master of a slave, is not liable for injuries, caused by the negligent conduct of such slave, while not acting in his master's employment, or under his authority.—*Cuthorn vs. Deas.*

376

MORTGAGE.

1. In the case of a mortgage, as in other deeds, in which fraud is alleged to have been committed, a party is not entitled to an unlimited time for the prosecution of his rights, after his knowledge of the existence of those rights, and of the fraud—but in such case, after an unreasonable delay, the law will presume a payment or discharge of the equity.—*Hatfield vs. Montgomery.*
2. Where the allegations of a bill in chancery, were, that a slave had been conveyed, with an agreement to allow the privilege of redeeming or repurchasing, to the party conveying, and the conveyance was on its face, absolute, (the subscribing witness to which, was not produced, nor his absence accounted for,) and there was no positive testimony rebutting the implicit denial of a defeasance, by the answer; and a lapse of twenty six years had ensued, without excuse for the delay, the Court refused to disturb the sale.—*Id.*
- 3 In determining between an absolute sale and a mortgage, the Court, will take the intention of the parties, from a view of all the circumstances; and where it is evident that a *prima facie* absolute sale, was intended as a pledge, the Court will relieve against the sale, and suffer a redemption.—*May & May, ex'rs, vs. Eastin.*
4. Where A, having slaves levied on under execution, in favor of the Tombeckbee Bank, and being about to discharge the same by payment of the notes of that Bank, was hindered from so doing by the representations of B, that it would not be a good payment, but who, on an agreement with A, paid off the execution in the same money, and took a purchase of one of the slaves. (with a condition of redemption in three months:) the Court, on a bill filed after the expiration of three months, held the transaction a mortgage, and decreed restitution, on the payment by A, of one half the nominal value of the Tombeckbee Bank notes, paid by B, in discharge of the execution.—*Id.*
5. The general rule, that a mortgagor, seeking to redeem, must pay costs, does not apply to a case, where the mortgagee sets up an absolute title in himself.—*Id.*
6. Detinue, lies by the mortgagee, to recover possession of personal property mortgaged, after the time for the redemption of the mortgagee, has expired. *Hopkins vs. Thompson.*
7. The question, whether the transaction was intended as a mortgage, or as an absolute sale, is one of fact, for the determination of a jury.—*Id.*
8. Bill filed to foreclose a mortgage on real estate, against several contending parties (whose rights doubtful) dismissed on grounds,—1st. That the mortgage secured other property, sufficient to meet the mortgage debt. 2d. That one of the defendants having died *pendente lite*, and his representatives being materially interested, no steps had been taken to make them parties.—*Koger vs. Weakly, et al.*

58

58

414

414

414

433

433

516

NAVIGABLE STREAM.—see WATER COURSE.

LANDS, AND CONVEYANCE OF

2. In the case of *sections*, the government has arranged their boundaries, marked their lines and corners, and declared the contents; and the purchaser of an *entire section* takes all within those limits, be it more or less than the quantity returned by the surveyor: but in the purchase of a *less* quantity than a *section*, (as between the several holders of a *section*) the contents of such several parts must be determined by reference to the *entire section*: and the purchaser of a half or quarter *section*, is entitled to one-half or one-fourth of whatever the *section* contains. In such case the half mile posts or corners are to be placed equi-distant between the corners of a *section*; for these half mile posts are not definitively fixed by law, as in the case of *section corners*....*ib.* 35
3. The complaint of a party, in a proceeding before a justice for forcible entry and detainer, need not specify the land by statutory demarkations of *section*, *township*, and *range*: any description by *metes and bounds*, and objects of notoriety in the neighborhood, is sufficient....*Mead v. Daniel, et al.* 36
3. The act of Congress of 29th May, 1830, granting pre-emption to settlers on public lands, having expressly inhibited all assignments and transfers of the right of pre-emption, prior to the issuance of the patent; a power, executed with authority to convey land entered under that act, when the patent should issue, was held to be but a circuitous evasion of the act of Congress, and consequently, void, and that a title obtained under such power, was illegal and inoperative. *Semble*—that the principle would not necessarily be the same, if, a bond, conditioned to make titles to the land, had been executed, and ratified by an execution of the conveyance, after the patent had issued; the latter would have constituted a new contract...although the penalty of the bond itself, or damages for its breach, might not have been recoverable...*M'Elroy v. Hyster* 148
4. The duplicate receipt of the Receiver of public monies (on an entry of public lands) is, before the issuance of the patent thereon, sufficient evidence of title to authorise the *bona fide* holder of the same, to maintain the action of trespass to try title.—*Bullock vs. Wilson.* 435

LANDLORD AND TENANT.

1. The general rule, that a defendant in ejectment may be permitted to set up an outstanding title in another, and that the landlord may defend the action by being made a co-defendant—does not apply in an action by a purchaser at a sheriff's sale, to recover possession.—*Avent vs. Read.* 489
2. In an action of trespass, to try title, brought by the purchaser of land at a sheriff's sale, against the defendant in execution, to recover possession, the latter can shew title in another....*ib.* 489

LEGISLATURE.

1. The Legislature has, the same right to authorise the erection of toll bridges, by act incorporating a company for that purpose, which it has vested in the County Courts.—*Dyer vs. Tuscaloosa Bridge Company.* 296
2. The Legislature, in an act incorporating a Bridge Company, having provided a mode for assessing the damages which might be sustained by the owner of any land, selected as a site and as a road to and from said bridge—such mode is conclusive, and the proprietor of land, so appropriated, must resort to the means pointed out by the statute, for compensation *ib.* 296
3. *Semble*:—The authority, under an act of the Legislature to erect a mill on such water course, must be exercised with reference to the rule, *sic utere tuo, ut alienum non ledas*.—*Bullock vs. Wilson.* 436

LETTERS OF GUARDIANSHIP.

1. If, in a suit by guardians, it is omitted in the declaration to make proof of the letters of guardianship, such defect is cured by a verdict.—*Switzer vs. Guardians of Holloway.* 88
2. The omission to make proof of letters of guardianship, can only be taken advantage of by demurrer.—*ib.* 88

LIMITATIONS, STATUTE OF

1. *Semble*.—The effect of the act of 1806, which prohibits any action from being brought against an executor or administrator within six months from the time

of proving the will or granting letters of administration—should be, to suspend for that time, the running of the statute of limitations.—*Hutchison versus Tolls.*

2. Where, in an action brought against an executor, to recover a debt due by his testator, a replication to a plea of the statute of limitations only alleged that letters testamentary were not granted to the executor until more than two years after the testator's decease—Held: That this replication was bad, and was no bar to the plea; because, only averring that letters testamentary were not granted for so long a period, left the legal presumption uncontradicted, that letters of one kind or another, had been previously issued.—*Id.*
3. Though the account of a plaintiff exhibit no charge against a defendant within six years, yet an item in the defendant's account, within that period, takes the case without the statute of limitations, of six years.—*Marrs ex'ix vs. Southwick, Cannon & Warren.*

MASTER AND SERVANT.

1. The master of a slave, is not liable for injuries, caused by the negligent conduct of such slave, while not acting in his master's employment, or under his authority.—*Cavethorn vs. Deas.*

MORTGAGE.

1. In the case of a mortgage, as in other deeds, in which fraud is alleged to have been committed, a party is not entitled to an unlimited time for the prosecution of his rights, after his knowledge of the existence of those rights, and of the fraud—but in such case, after an unreasonable delay, the law will presume a payment or discharge of the equity.—*Hatfield vs. Montgomery.*
2. Where the allegations of a bill in chancery, were, that a slave had been conveyed, with an agreement to allow the privilege of redeeming or repurchasing, to the party conveying, and the conveyance was on its face, absolute, (the subscribing witness to which, was not produced, nor his absence accounted for,) and there was no positive testimony rebutting the implicit denial of a defeasance, by the answer; and a lapse of twenty six years had ensued, without excuse for the delay, the Court refused to disturb the sale.—*Id.*
3. In determining between an absolute sale and a mortgage, the Court, will take the intention of the parties, from a view of all the circumstances; and where it is evident that a *prima facie* absolute sale, was intended as a pledge, the Court will relieve against the sale, and suffer a redemption.—*May & May, ex'rs, vs. Eastin.*
4. Where A, having slaves levied on under execution, in favor of the Tombeckbee Bank, and being about to discharge the same by payment of the notes of that Bank, was hindered from so doing by the representations of B, that it would not be a good payment, but who, on an agreement with A, paid off the execution in the same money, and took a purchase of one of the slaves. (with a condition of redemption in three months:) the Court, on a bill filed after the expiration of three months, held the transaction a mortgage, and decreed restitution, on the payment by A, of one half the nominal value of the Tombeckbee Bank notes, paid by B, in discharge of the execution.—*Id.*
5. The general rule, that a mortgagor, seeking to redeem, must pay costs, does not apply to a case, where the mortgagee sets up an absolute title in himself.—*Id.*
6. Detinue, lies by the mortgagee, to recover possession of personal property mortgaged, after the time for the redemption of the mortgage, has expired. *Hopkins vs. Thompson.*
7. The question, whether the transaction was intended as a mortgage, or as an absolute sale, is one of fact, for the determination of a jury.—*Id.*
8. Bill filed to foreclose a mortgage on real estate, against several contending parties (whose rights doubtful) dismissed on grounds,—1st. That the mortgage secured other property, sufficient to meet the mortgage debt. 2d. That one of the defendants having died *pendente lite*, and his representatives being materially interested, no steps had been taken to make them parties.—*Koger vs. Weakly, et al.*

NAVIGABLE STREAM.—see WATER COURSE.

NEGLIGENCE.

1. A and W entered into a covenant, whereby A, after acknowledging himself indebted to W, assigned to him certain bonds. One T also signed the covenant, (as attorney for W) which was drawn to answer as a receipt from T, and also as an assignment of the bonds. In an action by W's executors upon the covenant—Held, 1st. That the *negligence* of W in collecting the assigned bonds, was not in issue under the plea of "*covenant performed*." 2d. That T. was a competent witness to shew the result of his efforts to collect the bonds.—*Alldridge vs. Warner's executors*. 92
2. Where there is a clear and substantial cause of action, set forth in a declaration, although it contains irrelevant, or superfluous matter, or duplicity, yet the defendant shall be bound to answer it.—*Evans vs. Watrous*. 205
3. Where the maker of a note, after suit brought by the assignee, offers to pay said assignee part of the money, and he refuses to receive it, and it cannot afterwards be recovered, it is negligence on the part of such assignee, and he must, to that extent sustain the loss.—*Hightower vs. Ivy*. 208

NEGRO OR FREE PERSON OF COLOR.

1. In suits between a white man, and a free person of color, or of mixed blood within the third degree, where the amount in controversy is under twenty dollars, and the former is sworn, the latter has also a right to the advantage of his own oath.—*Ivey vs. Hardy*. 548

NEW TRIAL.

1. The refusal, of a Common Law Judge, to grant a new trial, in a case adjudged before him, and where all the facts were properly cognizable, is not a good cause for an application to chancery.—*Haughj vs. Strang*. 177
2. The Supreme Court will not review the discretionary power of an inferior Court, in granting or withholding new trials.—*Malone & Lake vs. Eastin & Gayle*. 182
3. Where part of the term of a Court was held by one Judge, and part by another, held, that the latter was not precluded from considering a motion for a new trial, in a cause adjudged by the former.—*Ib*. 188
4. Although the Supreme Court will not examine into the merits of an application to an inferior Court, for a new trial; yet the competency of such Court to grant it, is a proper subject of revision.—*Barr vs. White*. 342
5. By the practice of the Courts of this State, the term of the Court is the limit within which the power of granting new trials is to be exercised.—*ib*. 342
6. Whether in a proceeding before a Justice of the Peace for forcible entry and detainer, the Justice has the discretionary power of granting a new trial on merits—*Quere*.—*ib*. 342
7. Where, after a judgment for defendant, on unlawful detainer, a Justice, (after three days consideration) granted a new trial to plaintiff, and gave a new judgment, without notice to defendant; held to be error.—*ib*. 342

NON CLAIM, STATUTE OF

1. Where it appeared, that a demand against an estate had not been presented within eighteen months after the grant of letters testamentary, but, *that, the demand had accrued after that period*; held, That the demand was not precluded or barred under the statute of non-claim, as that statute does not commence running until the claim has accrued, or the party has a right to sue.—*Neal vs. Cunningham's ex rs*. 171

NOTES—see BILLS OF EXCHANGE AND PROMISSORY NOTES.**OATH.**

1. In suits between a white man, and a free person of color, or of mixed blood within the third degree, where the amount in controversy is under twenty dollars, and the former is sworn, the latter has also a right to the advantage of his own oath.—*Ivey vs. Hardy*. 548

OFFICERS.

1. In actions against officers, for failure to return process at a particular day, the

- Courts are privileged to hear any matter of equity in excuse for the failure.—
And where the amount involved is under twenty dollars, such excuse may
be shown by the oath of the officer.—*Starnes & Co. vs. Pierce.* 227
2. Bonds, voluntarily executed to civil officers, in relation to judicial proceedings
though invalid as statute bonds, may, if they contain valid and sufficient con-
sideration, be available as Common Law bonds.—*Seacall vs. Franklin, et. al.* 493

ORPHANS' COURT.

1. The Orphan's Court, in this State, has jurisdiction in a case of adminis-
tration, where the truth of an inventory is contested; and may try and decide
the question, whether, or not, certain property belongs to the estate.—*Dobbs*
et al. vs. distributees of Cockerham. 328
2. In settling a contest of this kind, the Orphans' Court has authority to summon
a jury to determine questions of fact, on which the parties interested may be
at issue.—*Id.* 328
3. Where, in such a case, it is decided that certain property, not embraced in the
inventory, belongs to the estate, the Court has power to direct a division of
such property among the distributees; or if that cannot be done, a public sale
of the property should be ordered, as provided for by the statute, and the pro-
ceeds of such sale should be divided; and it is error for the Court at once to
give judgment against the administrator in cash, in favor of the distributees,
for the value of the property as assessed by the jury.—*Id.* 328
4. The jurisdiction extended to the County Court in cases of this character, does
not deprive parties of their remedy by action on the bond, or by bill in chance-
ry.—*Id.* 328

PAPER SECURITIES.

1. It is competent for a defendant to show by testimony, that an instrument assign-
ed as a conditional payment or collateral security of a pre-existing debt;
was good and available in the hands of the plaintiff, at the time of assign-
ment and afterwards.—*Trotter vs. Crockett.* 401
2. The holder of an instrument, (transferred as conditional payment or collateral
security) is not bound first to sue thereon,—or to offer to, or return the same;
in order to maintain an action on the original debt or consideration, intended
to be secured by such instrument.—*Id.* 401
3. Where paper securities have been transferred as an *absolute payment* of a pre-
existing debt, then no resort can be had on such debt, or its original consid-
eration—and the party receiving the same must take his recourse on the paper
so transferred—(unless indeed they be forged, or fraud be committed in the
representation of their value.)—*Id.* 401
4. But if the transfer of paper be intended merely as a conditional payment, or as
a collateral security, the successful pursuit of the original debt, will depend
on the fact, whether or not *laches* has been committed by the holder, whereby
any liability on it has been lost to the party transferring it.—*Id.* 401

PARTNERS.

1. In an action by partners, on a partnership demand, a judgment, obtained against
one of the firm, by the defendant, is not available as an off-set.—*Pierce &*
Baldwin vs. Hickenburg. 196
2. In an action against several copartners, on a copartnership debt, the notice au-
thorised by the statute of 1807, providing for taking the depositions of a wit-
ness, about to leave the State, is good, if only served upon one partner.—*Cox,*
et al. vs. Cox. 533

PAYMENT.

1. Cases carried from Justices Courts into the Circuit or County Courts, by *cer-
torari* or appeal, are triable *de novo* on their merits and equity; and a payment
made after the rendition of a judgment by a magistrate, is available, without
a special plea *puis darrein continuance*.—*Hagen vs. Thompson.* 48
2. Payment in discharge of a debt, in genuine Bank Notes, if made *bona fide*,
and in ignorance of the failure of the Bank, is a valid payment; though at
the time, the notes might be valueless.—*Loerry vs. Murrell.* 280

PLEADING.

1. Where, in an action brought against an executor, to recover a debt due by his testator, a replication to a plea of the statute of limitations only alleged that letters testamentary were not granted to the executor until more than two years after the testator's decease.—Held: That this replication was bad, and was no bar to the plea; because, only averring that letters testamentary were not granted for so long a period, left the legal presumption uncontradicted, that letters of one kind or another, had been previously issued.—*Hutchison vs. Tolls.* 44
2. If, in a suit by guardians, it is omitted in the declaration to make profert of the letters of guardianship, such defect is cured by a verdict.—*Switzer vs. Guardians of Holloway.* 88
3. The omission to make profert of letters of guardianship, can only be taken advantage of by demurrer.—*ib.* 88
4. Cases carried from Justices Courts into the Circuit or County Courts, by *certiorari* or appeal, are triable *de novo* on their merits and equity; and a payment made after the rendition of a judgment by a magistrate, is available, without a special plea *puis darrein continuance*.—*Hagen vs. Thompson.* 48
5. Where there is a joint interest existing in a contract, and one of the parties dies, before action is commenced, such action must be brought in the name of the survivor; and a failure to set out in the declaration the contract, as it existed, and to shew the interest of the plaintiff to be as survivor, is error.—*Callison v. Little.* 89
6. A and W entered into a covenant, whereby A, after acknowledging himself indebted to W, assigned to him certain bonds. One T also signed the covenant, (as attorney for W) which was drawn to answer as a receipt from T, and also as an assignment of the bonds. In an action by W's executors upon the covenant.—Held, 1st. That the negligence of W in collecting the assigned bonds, was not in issue under the plea of "*covenant performed*." 2d. That T. was a competent witness to shew the result of his efforts to collect the bonds. *Aldridge vs. Warner's executors.* 92
7. A plea being double, (provided it contains any one substantial defence,) is not a defect of substance; but is a redundancy which, whether of good or bad matter, will not vitiate.—*Callison vs. Lamons.* 145
8. Objection to the time of filing a plea, is waived by a demurrer thereto.—*ib.* 145
9. A plea, to an action of trespass, assault and battery, that the assault and battery were committed beyond the jurisdiction of the Court, is not available.—*ib.* 145
10. A plea, alleging that the defendants were served with process out of the county of B, in the Cherokee nation, held bad, without the further averment, that the defendants were not residents of the county of B—as by the act of 1818 process was authorised to be served in Indian lands, upon any one, resident of the county, from which issued.—*ib.* 146
11. While a mere entry or statement of the name of a case, and of the counsel prosecuting and defending it, not shown by whom made, (not being such an entry of appearance as is required by the rules of Court,) or the giving of a reply bond, (in an action of detinue,) or the filing of a plea in abatement to the writ; are not, in either case, such an appearance as will waive the right of an objection to an abateable defect in the writ: Yet, a plea to such defect, to be available, must appear to have been submitted at the proper time, in the proper place, and in the mode prescribed by the statute.—*Nabors vs. Nabors.* 162
12. Where, in a declaration, in trespass *vi et armis*, the time of committing the trespass was left blank, held, that the defect was one, cured by the statute of amendments, and not available on demurrer.—*Estill vs. Shelley.* 165
13. Where there is a clear and substantial cause of action, set forth in a declaration, although it contains irrelevant, or superfluous matter, or duplicity, yet the defendant shall be bound to answer it.—*Erans vs. Watrous.* 205
14. An averment in a declaration, against an attorney for negligence, that he had negligently commenced a suit, and improperly dismissed it, contrary to his duty, &c.—held, to be a sufficient charge of gross negligence, to put the defendant, upon his plea.—*ib.* 205
15. The Courts are not bound judicially to know, that, an instrument declared on, as made "at Virginia, to wit, in Greene county," was executed in the State of Virginia—and where nothing is shewn by which to infer that the State of Virginia was meant, it will be presumed that "Virginia" was some place in the county, where the action was brought.—*Richardson vs. Williams.* 239

PLEADING.

16. Whether a defect, existing in the indorsement of a writ, is available on demurrer, where a party has craved oyer, and filed that demurrer in time: or, whether there may not be a proper case for demurrer, after a judgment by default.—*Quere.*—*Burford vs. Cunningham.* 244
17. But, after a judgment by default, a party will not be permitted by demurrer, to evade that rule of practice, which prohibits all dilatory pleas without the consent of the adversary, after the time for filing those pleas has expired.—*Id.* 244
18. A plea, commencing with matter of abatement, and concluding in bar, is defective and bad, on demurrer.—*Rogers & Sons vs. Smiley & Griffin.* 249
19. As a general rule, a demurrer opens the whole pleadings in a cause, to the consideration of the Court, and will be extended to the first substantial defect existing therein; but this is always upon the supposition, that the pleadings have been properly filed—in due time, and perfect order.—*Id.* 249
20. And where a plea in abatement was filed after several continuances, and after a demurrer had been considered, and the general issue pleaded, the Court refused to extend a demurrer to the plea, back to a supposed defect in the declaration.—*Id.* 249
21. The Supreme Court has no power, to control the discretion of inferior Courts, in regulating pleadings, allowing amendments and filing additional pleas; but, this must be understood to be confined to such pleas as are consistent with each other, and with the regular order of pleading.—*Tate vs. Gilbert.* 386
22. That an inferior Court allowed a defendant to withdraw the plea of general issue, and to substitute other pleas in bar of the action; is not error.—*Id.* 386
23. A plea, *puis darrein continuance*, is a waiver of all former pleas; and where three pleas were filed, the latter of which was one, *puis darrein continuance*, held, that the plaintiff was not bound to answer either, and that he properly demurred to the whole.—*Id.* 386
24. Although it is error, that judgment should be entered for a greater amount than that claimed in the declaration, yet, judgment will not be reversed as to mere technical divisions of the separate amounts of debt and damages, when the aggregate amount of such judgment, is less, than the aggregate sum laid in the declaration.—*Boardman vs. Poland.* 431
25. *Semble*—that if in an action of debt, no damages are laid in the declaration, yet a recovery may be had of the interest.—*McWhorter vs. Sandifer.* 519
26. It is not error, that in an action of debt, or assumpsit, to recover the amount of any writing, (embraced in the statutes, authorising the calculation of interest by way of damages, for the detention of money up to the time of the rendition of judgment) that more interest by way of damages for the detention, is adjudged by the Court, than is demanded in the declaration: provided, it appears, that no more has been adjudged by way of interest, than is recoverable, by law, upon the debt, as shewn to be due, and unpaid, by the record.—*Id.* 519
27. Where, in an action, by the indorsee of a note against the maker, the declaration described it as payable to A. B. or order, and the note was payable alone to A. B.—held to be an immaterial variance.—*Harrison vs. Weaver.* 542
28. A variance in the description of a contract, which must be construed the same, whether the variance exist or not, not changing its nature; will not be regarded.—*Id.* 542

PRACTICE.

1. It is a rule of practice in equity, that a bill may be dismissed, *on motion*, at any time, for want of equity.—*Hanghy vs. Strang.* 177
2. Although the Supreme Court will not examine into the merits of an application to an inferior Court, for a new trial; yet the competency of such Court to grant it, is a proper subject of revision.—*Barr vs. White.* 342
3. By the practice of the Courts of this State, the term of the Court is the limit within which the power of granting new trials is to be exercised.—*Id.* 342
4. Whether in a proceeding before a Justice of the Peace for forcible entry and detainer, the Justice has the discretionary power of granting a new trial on merits.—*Quere.*—*Id.* 342
5. Where, after a judgment for defendant, on unlawful detainer, a Justice, (after three days consideration) granted a new trial to plaintiff, and gave a new judgment, without notice to defendant; held to be error.—*Id.* 342

PREEMPTION.

1. The act of Congress of 29th May, 1830, granting pre-emptions to settlers on public lands having expressly inhibited all assignments and transfers of the right of pre-emption, prior to the issuance of the patent, a power, executed with authority to convey land entered under that act, when the patent should issue, was held to be but a circuitous evasion of the act of Congress, and consequently, void, and that a title obtained under such power, was illegal and inoperative.—*McEllyn vs. Hayter*. 148
2. *Seemle*—that the principle would not necessarily be the same, if a bond, conditioned to make titles to the land, had been executed, and ratified by an execution of the conveyance, after the patent had issued; the latter would have constituted a new contract—although the penalty of the bond itself, or damages for its breach, might not have been recoverable.—*Ib.* 148

PROCESS.

- 1 In actions against officers, for failure to return process at a particular day, the Courts are privileged to hear any matter of equity in excuse for the failure—And where the amount involved is under twenty dollars, such excuse may be shewn by the oath of the officer.—*Starnes & Co. vs. Pierce*. 227

PROPERTY.

1. If, in a suit by guardians, it is omitted in the declaration to make proof of the letters of guardianship, such defect is cured by a verdict.—*Switzer vs. Guardians of Holloway*. 88
2. The omission to make proof of letters of guardianship, can only be taken advantage of by demurrer.—*Ib.* 88

PUBLIC LANDS—vide LANDS.**RECORDS, AND AUTHENTICATION OF**

1. Where the record of a judgment rendered in another state, was in the following words, "for the sum of two hundred and twenty dollars debt, which may be discharged by the payment of one hundred and ten dollars," &c.—*Held*, 1st. That debt was a proper action for the recovery of the claim. 2d. That in an action to recover the amount due on the judgment, it was not error to declare for the conditional sum of one hundred and ten dollars.—*Carter vs. Crews*. 81
2. The certificate of a presiding Judge, to the record of another State, that the clerk attesting the record, was clerk at the date of his, the Judge's certificate and that the attestation was in proper form; held, to be a sufficient compliance with the provisions of the act of Congress regulating the authentication of records.—*Merritt vs. Garvin*. 199
3. It is not essential, that the Judge's certificate should state, that the clerk attesting the record, was clerk, at the date of attestation.—*Ib.* 199

RECEIPT.

1. The duplicate receipt of the Receiver of public monies (on an entry of public lands) is, before the issuance of the patent thereon, sufficient evidence of title to authorise the *bona fide* holder of the same, to maintain the action of trespass to try title.—*Bullock vs. Wilson*. 436
2. If a receipt in discharge of a right has been executed voluntarily and with a proper understanding, and there is no proof of fraud, mistake, or ignorance of the rights of the party executing it: the presumption in favor of its validity, must prevail.—*Caldwell vs. Gilles and ux.* 526
3. Where it appeared that a receipt, charged to have been procured fraudulently, was the motive which induced the defendant to distribute an estate to the advantage of the complainant, and at the risk of injury to the defendant; and there was no proof of fraud in procuring the receipt, the Court refused to determine the receipt void and inoperative.—*id.* 526

RECEIVER OF PUBLIC MONIES.

1. The duplicate receipt of the Receiver of public monies (on an entry of public lands) is, before the issuance of the patent thereon, sufficient evidence of

title to authorise the *bona fide* holder of the same, to maintain the action of trespass to try title.—*Bullock vs. Wilson*.

436

RELEASE.

1. A release entered on the minutes of the Court, (not signed, sealed or delivered to the witness, and implying a mere discharge as to the interest in the particular action,) is not sufficient to authorise an incompetent witness to give testimony.—*Kennon vs. McRae*.

369

SALE.

1. Where the allegations of a bill in chancery, were, *that a slave had been conveyed, with an agreement to allow the privilege of redeeming or repurchasing, to the party conveying*, and the conveyance was on its face, absolute, (the subscribing witness to which, was not produced, nor his absence accounted for,) and there was no positive testimony rebutting the implicit *denial of a defeasance*, by the answer; and a lapse of twenty six years had ensued, without excuse for the delay, the Court refused to disturb the sale.—*Hatfield vs. Montgomery*.
- 2 In determining between an absolute sale and a mortgage, the Court, will take the intention of the parties, from a view of all the circumstances: and where it is evident that a *prima facie* absolute sale, was intended as a pledge, the Court will relieve against the sale, and suffer a redemption.—*May & May, ex'rs, vs. Eastin*.
3. Where A, having slaves levied on under execution, in favor of the Tombeckbee Bank, and being about to discharge the same by payment of the notes of that Bank, was hindered from so doing by the representations of B, that it would not be a good payment, but who, on an agreement with A, paid off the execution in the same money, and took a purchase of one of the slaves, (with a condition of redemption in three months:) the Court, on a bill filed after the expiration of three months, held the transaction a mortgage, and decreed restitution, on the payment by A, of *one half* the nominal value of the Tombeckbee Bank notes, paid by B, in discharge of the execution.—*Id*.
4. The question, whether a transaction was intended as a mortgage, or as an absolute sale, is one of fact, for the determination of a jury.—*Hopkins vs. Thompson*.

50

414

414

433

SCIRE FACIAS.

1. A *scire facias* against executors or administrators, to shew cause why execution, *de bonis propriis* should not issue, (after a judgment by default against the estate,) is not allowable on the bare return of *nulla bona*, to an execution *de bonis testatoris*.—*Bank vs. Hooks & Davis*.

271

SEAL.

1. Sealing is an essential requisite to constitute a perfect bond, and an instrument purporting to be a *certiorari bond*, but containing no seals, is void.—*Skinner vs. McCarty*.
2. An obligation or agreement signed between two or more parties, concluding "Given under our hands and seals," and containing a seal after the name of the first signer, (the other signing immediately under it,) is a *sealed instrument*, and assumpsit is not maintainable thereon.—*Hatch vs. Crawford*.
3. The notice authorised by the 9th section of the act of incorporation of the Branch of the Bank of the State of Alabama at Montgomery, to a maker or indorser of a bill or note, need not be under the corporation seal.—*Bank vs. Harrison*.

19

54

540

SEALED INSTRUMENT.

1. A and B bound themselves by a *sealed agreement* to abide the award of certain others chosen by themselves, in a controversy between them; and that whatever amount was found against either should be paid in *debts due to the party found debtor*.—Held, That where A on the balance found against B commenced an original attachment, and obtained judgment by default, without a jury, as in *indebitatus assumpsit*, for the amount in money, such judgment was erroneous, and that A had not resorted to the proper action.—*Horton vs. Ronalds*.

79

SEALED INSTRUMENT.

2. An obligation or agreement signed between two or more parties, concluding "Given under our hands and seals," and containing a seal after the name of the first signer, (the other signing immediately under it,) is a *sealed instrument*, and assumption is not maintainable thereon.—*Hatch vs. Crawford.*

54

SET OFF.

1. A notice of set-off, is not part of the record, and any errors in the proof relating to it, must be shewn by bill of exceptions.—*Pledger vs. Glover.*
2. In an action by partners, on a partnership demand, a judgment, obtained against one of the firm, by the defendant, is not available as an off-set.—*Pierce & Baldwin vs. Hickenburg.*

174

196

SHERIFF.

1. When a sheriff sells property upon an execution, which is encumbered by a deed of trust, on which a sum of money is to fall due some months after the sale, the sheriff cannot legally adjust the trust debt, of his own authority, by paying the money to become due upon it, out of the proceeds of the sale.—*Baylor vs. Scott.*
2. The plaintiff in execution—not the sheriff—is entitled to the benefit of a trust deed on paying off the debt secured by it; and the trustee will be bound to execute the trust.—*Ib.*
3. Where a sheriff, in his return, offers an excuse for not paying over the whole of the money, which is insufficient, the Court would be bound to disregard such excuse, in a proceeding against the sheriff.—*Ib.*
4. In a proceeding against a sheriff, his own return is not conclusive in his favor, either as to the law or the facts involved.—*Ib.*
5. The act of 1807, giving a defendant in execution a summary remedy against a sheriff for failing to pay over an excess collected by him on such execution, provides that such defendant shall have the same remedy that plaintiffs in execution are entitled to against a sheriff, for failing to pay over money collected; but that act must not be so construed as to extend to defendants in execution the remedies provided for plaintiffs in execution, by subsequent statutes, whereby the limitation as to the time of commencing the proceeding is omitted, the time of notice abridged, and the penalty increased.—*Ib.*
6. The act of 1807 is to be construed with reference to laws then in existence.—*Ib.*
7. The bond, authorised by statute, on the replevy of property taken in attachment, must be payable to the sheriff, not the plaintiff in the attachment.—*Swall vs. Franklin et al.*
8. But where a sheriff, having attached the goods of A, at the suit of B, delivered them to C, and D, who did not appear to be the agent, attorneys or factors of the defendant in the attachment, or acting under his authority; and took their bond, payable to B, conditioned, for the return of the goods to the said sheriff, or for the payment of such judgment as might be had in the attachment cause: in debt brought upon the bond by B, held—that the bond was not recoverable, either as a statute, or Common Law obligation.—*Ib.*

315

315

315

315

315

315

493

493

SHERIFF'S RETURN.

1. Where a sheriff, in his return, offers an excuse for not paying over the whole of the money, which is insufficient, the Court would be bound to disregard such excuse, in a proceeding against the sheriff.—*Baylor vs. Scott.*
2. In a proceeding against a sheriff, his own return is not conclusive in his favor, either as to the law or the facts involved.—*Ib.*

315

315

SHERIFF'S SALE.

1. When a sheriff sells property upon an execution, which is encumbered by a deed of trust, on which a sum of money is to fall due some months after the sale, the sheriff cannot legally adjust the trust debt, of his own authority, by paying the money to become due upon it, out of the proceeds of the sale.—*Baylor vs. Scott.*
2. The general rule, that a defendant in ejectment may be permitted to set up an outstanding title in another, and that the landlord may defend the action by

315

- being made a co-defendant—does not apply in an action by a purchaser at a sheriff's sale, to recover possession.—*Arent vs. Read.* 480
3. In an action of trespass, to try title, brought by the purchaser of land at a sheriff's sale, against the defendant in execution, to recover possession, the latter can not shew title in another.—*ib.* 480

SLANDER.

1. To say of a member of the Legislature, in reference to the future discharge of his public functions, that "he is a corrupt old tory," held, not to be actionable *per se.*—*Hogg vs. Dorrah.* 212
2. Words, charged as slanderous, are to be construed neither in their most harsh, nor innocent sense; but, in their plain and common acceptation, and according to their popular use, and obvious import.—*ib.* 212
3. The principle is well settled, that words may be actionable, if uttered against officers, or others in public stations of trust or profit, which would not be so, if spoken against common individuals.—*ib.* 212
4. But, words to be actionable, if uttered against official persons, must relate to past conduct, implying criminality or moral turpitude, and not to the prospect of future misconduct in office.—*ib.* 212
5. *Semble*, that if there be any exception to this rule, it is in the case of clergymen.—*ib.* 212

SLAVE.

1. The master of a slave, is not liable for injuries, caused by the negligent conduct of such slave, while not acting in his master's employment, or under his authority.—*Cauthorn vs. Deas.* 276

SUNDAY.

1. A writ, which appeared from the teste thereof, to have issued on Sunday, held void.—*Haynes vs. Sledge & Mary.* 530
2. But, ruled competent for a plaintiff by replication to a plea, 'that a writ issued on Sunday,' to show facts authorising its issuance.—*ib.* 530
3. *Semble*—that circumstances which would justify the *service* of process, under the statute of 1803, would likewise authorise its *issuance.*—*ib.* 530

SUPREME COURT.

1. The Supreme Court will not review the discretionary power of an inferior Court, in granting or withholding new trials.—*Malone & Lake vs. Eastin & Gayle.* 182
2. Although the Supreme Court will not examine into the merits of an application to an inferior Court, for a new trial; yet the competency of such Court to grant it, is a proper subject of revision.—*Barr vs. White.* 342
3. The Supreme Court has no power to control the discretion of inferior Courts, in regulating pleadings, allowing amendments and filing additional pleas: but, this must be understood to be confined to such pleas as are consistent with each other, and with the regular order of pleading.—*Tate vs. Gilbert.* 386
4. It is definitely settled, that the Supreme Court will not look to the indorsement of a writ, for the purpose of finding error, to reverse a judgment.—*Boardman vs. Poland.* 431

TITLE—OUTSTANDING,

1. The general rule, that a defendant in ejectment may be permitted to set up an outstanding title in another, and that the landlord may defend the action by being made a co-defendant—does not apply in an action by a purchaser at a sheriff's sale, to recover possession.—*Arent vs. Read.* 480
2. In an action of trespass, to try title, brought by the purchaser of land at a sheriff's sale, against the defendant in execution, to recover possession, the latter can not shew title in another.—*ib.* 480

TORY—Vide "SLANDER."

TRESPASS, ASSAULT AND BATTERY,

1. In an action of trespass, assault and battery, against several, the jury, upon executing a writ of inquiry, must find a joint verdict against all the defendants, and cannot assess separate damages.—*Callison et al. vs. Lemons.* 145

TRESPASS, ASSAULT AND BATTERY,

9. A plea, to an action of trespass, assault and battery, that the assault and battery were committed beyond the jurisdiction of the Court, is not available.—*Ib.*

145

TRESPASS TO TRY TITLE.

1. In an action of trespass, to try title, a verdict for plaintiff, that he recover the land "and one moiety of the mills," sufficiently certain.—*Saucyer vs. Fitts.*
2. The general rule, that a defendant in ejectment may be permitted to set up an outstanding title in another, and that the landlord may defend the action by being made a co-defendant—does not apply in an action by a purchaser at a sheriff's sale, to recover possession.—*Avent vs. Read.*
3. In an action of trespass, to try title, brought by the purchaser of land at a sheriff's sale, against the defendant in execution, to recover possession, the latter can not shew title in another.—*ib.*
4. In the action of trespass to try title, damages for the detention of the premises, as well as possession, are recoverable.—*ib.*

9

480

480

480

TRUST.

1. When a sheriff sells property upon an execution, which is encumbered by a deed of trust, on which a sum of money is to fall due some months after the sale, the sheriff can not legally adjust the trust debt, of his own authority, by paying the money to become due upon it, out of the proceeds of the sale.—*Baylor vs. Scott.*
2. The plaintiff in execution, not the sheriff, is entitled to the benefit of a trust deed on paying off the debt secured by it; and the trustee will be bound to execute the trust.—*ib.*
3. A deed to a *feme covert*, and the heirs of her body, implying the creation of an *estate tail* in personal property, vests in her such absolute estate, as will be subject to the disposal of the husband, and liable for his debts.—*Harkins et. al. vs. Coalter, et. al.*
4. Equity will give effect to the terms of a deed, conveying property to a *feme covert* for her exclusive use, even where no trustee is nominated, and will regard the husband a trustee, so far as to enforce a compliance with the intentions of the donor. But the intention to create a trust estate for the wife must distinctly appear.—*ib.*
5. Where a deed of personal property, conveying the same to the wife, stipulated that the property was given for the *joint use, behoof and support of the husband and wife, and subject to their joint possession*; the Court held the deed not to create a separate and distinct estate for the wife, in exclusion of the husband's marital rights; but subject to his debts.—*ib.*

315

315

463

463

463

UNITED STATES LAND SURVEYS.

1. The United States, in providing for the survey of the public domain, established the rule, that sections of land should be held to contain the exact quantity returned by the Surveyor-General; so, that the corners of sections fixed by such survey, can not be removed.—*Walters vs. Commans.*
2. In the case of sections, the government has arranged their boundaries, marked their lines and corners, and declared the contents; and the purchaser of an *entire section* takes all within those limits, be it more or less than the quantity returned by the surveyor: but in the purchase of a *less* quantity than a section, (as between the several holders of a section) the contents of such several parts must be determined by reference to the entire section: and the purchaser of a half or quarter section, is entitled to one-half or one-fourth of whatever the section contains. In such case the half mile posts or corners are to be placed equi-distant between the corners of a section; for these half mile posts are not definitively fixed by law, as in the case of section corners....*ib.*

38

38

VARIANCE.

1. Where, in an action, by the indorsee of a note against the maker, the declaration described it as payable to *A. B.* or order, and the note was payable alone to *A. B.*—held to be an immaterial variance.—*Harrison vs. Weaver.*
2. A variance in the description of a contract, which must be construed the same,

542

whether the variance exist or not, not changing its nature; will not be regarded.—*Ib.*

542

VENUE.

1. The Courts are not bound judicially to know, that, an instrument declared on, as made "at Virginia, to wit, in Greene county," was executed in the State of Virginia—and where nothing is shewn by which to infer that the State of Virginia was meant, it will be presumed that "Virginia" was some place in the county, where the action was brought.—*Richardson vs. Williams.*

239

VERDICT.

1. In an action of trespass, to try title, a verdict for plaintiff that he recover the land "and one moiety of the mills," sufficiently certain.—*Sawyer vs. Fitts.*
2. If, in a suit by guardians, it is omitted in the declaration to make profert of the letters of guardianship, such defect is cured by a verdict.—*Switzer vs. Guardians of Holloway.*
3. In an action of trespass, assault and battery, against several, the jury, upon executing a writ of inquiry, must find a joint verdict against all the defendants, and can not assess separate damages.—*Callison vs. Lemons.*
4. The finding of a jury, in determining mutual demands between a plaintiff and defendant, "that they find the plaintiff indebted to the defendant in the sum of two dollars and forty cents, over and above the plaintiff's demand in this behalf," is good.

9

88

145

174

WATER COURSE.

1. Every water course in this State, suited to the ordinary purposes of navigation, whether it ebbs and flows, or not, (where the government has not expressly granted any part of the bed thereof, or computed it in the quantity granted,) is a public highway; and the owner of lands bounded by any such navigable stream, can assert no private right of soil to the bed of the river, beyond the low water mark.—*Bullock vs. Wilson.*
2. *Semble*:—The authority, under an act of the Legislature to erect a mill on such water course, must be exercised with reference to the rule, *sic uterz tuo, ut alienum non laedas*.—*Ib.*

436

436

WITNESS.

1. It is not competent for a witness to give testimony as to *Whether, a particular language used was calculated to produce fear in the mind of one, so as to induce him to execute a paper.* What that language was, must be submitted to the jury, from which their own inferences are to be drawn.—*Johnson, surr. v. Ballew, adm'r.*
2. In cases, where the absence of a subscribing witness to a deed is not accounted for, secondary evidence is not admissible, to prove the existence of such deed, or any defeasance connected therewith. *Hatfield vs. Montgomery.*
3. Where the allegations of a bill in chancery, were, *that a slave had been conveyed, with an agreement to allow the privilege of redeeming or repurchasing, to the party conveying,* and the conveyance was on its face, absolute, (the subscribing witness to which, was not produced nor his absence accounted for,) and there was no positive testimony rebutting the implicit *denial of a defeasance*, by the answer; and a lapse of twenty six years had ensued, without excuse for the delay, the Court refused to disturb the sale.—*Ib.*
4. The *assignee* of such person making the conveyance, held, not to be a competent witness, to prove the defeasance.—*Ib.*
5. *Ex-members* of a town corporation, are *ex necessitate*, competent witnesses in a suit by a stranger, against the body.—*Mayor, &c. vs. Wright.*
6. The statute of 1807, restricting the charge for attendance, in any bill of costs, of more than two witnesses to any one fact, must be understood, to mean such facts as are material, and which may necessarily arise in the progress of a cause, either incidentally, collaterally, or directly upon the issue, and it seems, not to have been the intention, to disallow the attendance of witnesses to the successful party, where, from the course of the adversary, or the decision of the Court, the evidence of such witnesses (otherwise proper) has been superseded, or dispensed with.—*Randolph vs. Perry.*

29

58

58

58

230

376

WITNESS.

7. In regard to the incompetency of a witness, a distinction exists, as to an interest in the *question*, and an interest in the *event* of the suit; and a witness *will* not be held incompetent to testify, unless it appear, that he is to gain or lose by the *event* of the suit: and any objection as to his interest in the question, goes to his credibility.—*Kearson vs. McRae*. 389
8. A release entered on the minutes of the Court, (not signed sealed or delivered to the witness, and implying a mere discharge as to the *interest in the particular action*,) is not sufficient to authorise an incompetent witness to give testimony.—*ib*. 389
9. As a general rule, an indorser of a note or bill, is incompetent in respect to his *interest*, as a witness in favor of a *subsequent* endorsee, to charge any party to the instrument whose liability is *anterior* to his own.—*ib*. 389
10. In an action against several copartners, on a copartnership debt, the notice authorised by the statute of 1807, providing for taking the depositions of a witness, about to leave the State, is good, if only served upon one partner.—*Cox, et al. vs. Cox*. 533
11. Where a commission, to take the testimony of a non-resident witness, appeared to have regularly issued, the Court held it not error, that the witness, being temporarily within the State, was examined here, and his interrogatories taken by the commissioner.—*ib*. 533

J. F. C.

✓
✓

1
2484 17

